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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 607

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased.

Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

JURISDICTIONAL STATEMENT

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Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Missouri entered on July 16, 1962, and submit this

statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is presented.

(a) OPINION BELOW

The opinion of the Supreme Court of Missouri (Appendix pp. A9-A26) is reported in 359 S.W.2d 790.

(b) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

(References are to the official transcript as certified by the Clerk of the Supreme Court of Missouri.)

(i) This is an appeal of two actions (consolidated and tried as one action in the Supreme Court of Missouri) brought in the Circuit Court of Cole County, Missouri, under the Missouri Administrative Procedure Act (Chapter 536, Missouri Revised Statutes, 1959) to review the decisions of Respondent Superintendent of Insurance of the State of Missouri (operating as an administrative agency under said Act) denying recovery on claims presented to him for attorneys' fees for services to the Division of Insurance for allowance and payment under the provisions of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959).

These claims were originally filed by two distinguished Missouri lawyers, Honorable John T. Barker and Honorable Floyd E. Jacobs. During the pendency of these proceedings both claimants died and the claim of General Barker is now being prosecuted by his daughter, Mildred B. Johnson, as his Administratrix, and the claim of Mr. Jacobs is now being prosecuted by his widow, Mary G. Jacobs, as executrix (Tr. 2, 82).

Mr. C. Lawrence Leggett, the Superintendent of Insurance who ruled adversely on these claims was succeeded in that office by Honorable Jack L. Clay, and the latter was substituted as party Respondent herein.

(ii) These claims were filed in writing before the Superintendent of Insurance in the year 1936, and remained pending before the Superintendent and undisposed of continuously thereafter (despite the continuous efforts of claimants to obtain a hearing) until February 7, 1958, when the Superintendent refused without notice to take jurisdiction and denied and dismissed the claims without a hearing (Tr. 6-7, 16, 24, 57, 58, 89-90, 110, 111, 143, 144).

Following the ruling by the Superintendent they filed two petitions for review of the order of the Superintendent in the Cole County, Missouri, Circuit Court, each in two count: Case No. 48716 for Mandamus and Certiorari (Tr. 1-62) and Case No. 48717 for Injunction and Declaratory Judgment (Tr. 82-108). Thus invoking all the review procedures provided by the applicable statute, Section 536.105, R.S. Mo. 1959. In the latter case Aetna Insurance Company, State Farm Mutual Insurance Company and Hardware Mutual Casualty Company were joined with the Superintendent as defendants as interested parties who might be required to contribute to the payment of fees under Sections 374.160 and 374.220, R.S. Mo., 1949 (Tr. 86, 87).

The Cole County Circuit Court sustained motions to dismiss Plaintiffs' petitions as to both counts on behalf of all defendants on the grounds said petitions failed to state claims upon which relief might be granted and upon their motions for new trial being overruled plaintiffs appealed to the Supreme Court of Missouri (Tr. 67, 71, 72, 73, 74, 166-169). The cases were consolidated in the Missouri Supreme Court for hearing and opinion.

The Opinion and Judgment of Division No. I of the Supreme Court of Missouri, in the consolidated case adverse to Appellants was entered on July 16, 1962 (Tr. 412-428). Appellant filed a timely Motion for rehearing or in the Alternative for transfer to the Supreme Court of Missouri, *en Banc*, in Division No. I of said Court which was overruled by that Division on September 10, 1962 (Tr. 429-444). Transfers of causes from Division to the Court, *en Banc*, of the Missouri Supreme Court may be ordered only by the Division having jurisdiction. Article V, Section 9, Missouri Constitution, 1949; *Scheufler* v. *Manufacturing L. Underwriters*, 349 Mo. 855, 163 S.W.2d 749. Upon Division No. I of the Missouri Supreme Court overruling Appellants' Motion for Rehearing or in the alternative for Transfer to the Court, *en Banc*, Appellants had exhausted all remedies in the State of Missouri and been precluded from recovery by the highest Court in the State of Missouri in which a decision could be had by reason of Division No. 1 of said Court refusing to transfer said cause to the Court, *en Banc*.

Notice of Appeal to the Supreme Court of the United State was served on counsel for the adverse parties and timely filed with Division No. 1 of the Supreme Court of Missouri on September 22, 1962 (Tr. 449-453, 487, Appendix pp. A41-A45).

(iii) The jurisdiction of the Supreme Court of the United States to review this decision is invoked under Title 28, U.S.C., Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * *

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The action of the State of Missouri in denying plaintiffs a judicial or quasi judicial remedy for adjudication of their rights under contract for legal services rendered the State admitted to be valid and fully performed is drawn in question as being repugnant to the Fourteenth Amendment to the Constitution of the United States.

The action of the State of Missouri in referring plaintiffs to the Missouri Legislature, a purely political body, for their sole remedy under a valid fully executed contract is drawn in question as being repugnant to the Fourteenth Amendment to the Constitution of the United States, particularly since the Missouri Insurance Department is required to be self-sustaining under the specific provisions of Sec. 374.160, R.S. Mo. 1959, and Missouri has a Constitutional Budget System (Article IV, Section 22, Mo. Const., 1945, and Section 374.160, R.S. Mo., 1959) which forbids the Missouri Legislature from appropriating funds for any unbudgeted purpose, except emergency appropriations recommended by the Governor, until all of the items in the executive budget have been acted upon.

The action of the State of Missouri through its Superintendent of Insurance and its Courts in refusing to afford or make available to plaintiffs means for auditing, allowing and budgeting funds for payment of plaintiffs' claims is also drawn in question as repugnant to the Fourteenth Amendment to the Constitution of the United States.

There was here drawn in questions Sections 536.105, 374.120, 374.160, 374.220, 374.230 and 374.260, R.S. Mo.,

1949, on the grounds that as construed by the Supreme Court of Missouri they are arbitrary, capricious, discriminatory, deny plaintiffs their civil rights to a judicial or quasi judicial forum and judicial or quasi judicial remedy and therefore repugnant to the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States and impaired their right to contract and the obligation of their contract in violation of Article X, Section 1 of the Constitution of the United States.

The decision of the Supreme Court of Missouri was in favor of their validity (359 S.W.2d 790).

(iv) The following decisions are believed to sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri on the ground there was drawn in question the validity of statutes of the State of Missouri on the grounds they were repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of their validity (28 U.S.C. 1257 (2)).

Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 S. Ct. 215, 95 L. Ed. 190.

Crane v. *Johnson*, 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348.

Truax v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131.

Lathrop v. *Donohue*, 367 U.S. 820, 824, 81 S. Ct. 1826, 1828, 6 L. Ed. 2d 191.

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Shelley v. *Kraemer*, 334 U.S. 1, 14, 15, 17, 68 S. Ct. 836, 842, 843, 844 (5, 6, 11), 92 L. Ed. 161.

Winters v. *People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840.
Poulos v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, 765, 97 L. Ed. 1105.

(v) The relevant provisions of the Statutes involved are set out in the Appendix.

(c) THE QUESTIONS PRESENTED BY THIS APPEAL

1. Whether the Superintendent of Insurance, the Trial Court and Division No. I of the Missouri Supreme Court in holding the Superintendent of Insurance and the Courts of Missouri are powerless to give plaintiffs a judicial or quasi judicial adjudication of their right to be paid under the provisions of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959) for services admittedly fully performed for the Division of Insurance under a valid contract in direct conflict with controlling decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding they do have rights to such an adjudication under either Sections 374.160 and 374.260 or under 374.220, R.S. Mo. 1959, with a specific procedural remedy under Section 536.105, R.S. Mo. 1959, of the Missouri Administrative Procedure Act are not arbitary, capricious, discriminatory and deny plaintiffs their civil rights to equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether in refusing to take jurisdiction and grant plaintiffs a means of adjudicating their claims on the grounds the Superintendent possessed no power or authority to allow and provide for payment of plaintiffs' claim

for legal services, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court denied plaintiffs access to the courts and denied them their civil rights to a right to a judicial or quasi judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Whether in denying plaintiffs the right to an adjudication of their rights under an admittedly valid contract admittedly fully performed, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court so construed Sections 536.105, 374.160, 374.230, 374.260 and 374.220 as to deprive plaintiffs of their civil rights to a judicial or quasi judicial forum and denied them a judicial or quasi judicial remedy, not only impaired their right to contract and the obligation of their contract, but denied them due process of law in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

4. Whether in denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo. 1959, to adjudicate rights to which they were entitled under Sections 374.160 and 374.260 or under Section 374.220, R.S. Mo., 1959, afforded others similarly situated and which the Supreme Court of Missouri, *en Banc*, in the cases of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106; *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held applicable, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court have acted arbitrarily, capriciously and discriminated against these plaintiffs and deprived these plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether in denying plaintiffs any judicial or quasi judicial remedy or judicial or quasi judicial forum for adjudication of their rights under their admittedly valid contract fully performed the Superintendent, the Trial Court and Division No. I of the Supreme Court of Missouri have struck down or arbitrarily and substantially impaired plaintiffs' civil rights to liberty to contract about their affairs and impaired the obligation of their contract, thereby discriminating against them and violating their statutory rights, and in doing so impaired the obligation of their contract and deprived them of their right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

6. Whether in holding the plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial or quasi judicial means of enforcement of their contractual rights under Chapter 374 of the Missouri Insurance Code (Chapter 374, R.S. Mo. 1959) and Section 536.105, R.S. Mo. 1959, which are also property rights, the opinion and judgment herein are capricious, arbitrary and discriminatory and deprive plaintiffs of their civil right to be protected against impairment of their contract by the State, including the means of enforcement in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States.

(D) STATEMENT OF FACTS.

In the opinion herein the Court said:

> "The facts are not in dispute." *State ex rel. Johnson* v. *Leggett*, Mo. Sup., 359 S.W.2d 790, 792.

Except for certain omissions such as the fact plaintiffs had claims on file with the superintendent continuously

from 1936 until 1958 (Tr. 5-7, 88-89) which the superintendent refused to act on, and the erroneous conclusions that plaintiffs' constitutional claims had been finally adjudicated against them and had been waived by them, the facts stated in the opinion are not questioned.

As the cases were dismissed on motion on the ground they failed to state a claim upon which relief could be granted the facts come from Plaintiffs' petitions and must be accepted as true (Tr. 71-72, 166-169). *State ex rel. Johnson* v. *Leggett*, Mo. Sup., 359 S.W.2d 790, 792; *Jacobs* v. *Jacobs*, Mo. Sup., 272 S.W.2d 185, 188 (2); *Ebling* v. *Hardesty*, Mo. App., 354 S.W.2d 348, 350 (2).

In June, 1930, two distinguished Missouri lawyers, John T. Barker and Floyd E. Jacobs, were employed by the Superintendent of Insurance of Missouri in writing with the approval of the Governor and Attorney General of that State to institute proceedings against approximately 155 stock fire insurance companies for restitution of excessive premiums collected by them in violation of the Superintendent's ten percent rate reduction order effective November 15, 1922. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165, 1167; *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792.

Under the terms of said contract said attorneys were to be paid a reasonable fee for their services out of the recaptured excess premiums. If not successful said attorneys were to receive no pay. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165-66. *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792.

From June, 1930 to 1936 said attorneys prosecuted said litigation in accordance with their contract, paid the expenses of their litigation out of their personal funds and succeeded in recapturing the sum of $2,751,000.00, and

after all policyholders had been paid who could be found there remained a fund of $2,160,871.32. *Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d, l.c. 1166, *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 792-3. A general outline of the services performed by plaintiffs may be found in plaintiffs' Exhibit 1 (Tr. 23-38, 108-123). *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 796.

Upon said recaptured funds being paid into Court, Barker and Jacobs filed a motion and application for the allowance of attorney's fees in the Cole County Circuit Court to be made a lien upon said fund; upon a hearing an order was made allowing said attorneys $275,000.00 and declaring such allowance a lien upon said fund. *Aetna Ins. Co.* v. *O'Malley*, l.c. 1166. *State ex rel.* v. *Leggett*, 359 S.W.2d, l.c. 793.

The Superintendent appealed and upon such appeal the Supreme Court of Missouri held said attorneys had a valid contract for services, that they had rendered valuable services but that the fund was a sacred fund for the policyholders and was not subject to the payment of such fees. *Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d 1164, 1166-1168, *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 793.

In the year 1936 and repeatedly and continuously thereafter said attorneys made claims for and requested the Superintendent to audit, fix, allow and pay their claims for services under said contract of employment; said claims remained on file and pending before the Superintendent continuously from 1936 to February 7, 1958, when the Superintendent, without notice or any hearing peremptorily dismissed and denied said claims stating he could not allow the claims as expenses of the Insurance Department under Section 374.160, R.S. Mo., 1959, nor could he allow such claims as expenses in proceedings against

insurance companies under Sections 374.160 and 374.220 R.S. Mo. (Tr. 16, 63, 64, 57, 58, 88, 89, 93, 95, 98). *State ex rel* v. *Leggett*, 359 S.W.2d, l.c. 793, 794, 795, 796, 797.

At various times from 1936 to 1957 in addition to their claims pending before the Superintendent said attorneys sought satisfaction of their claims out of the fund created by the recaptured excess premiums by applications to the legislature and by action in quantum meruit and other legal proceedings all without avail. *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d, l.c. 794-5; *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W. 1164; *Barker* v. *Leggett*, D. C., 102 F. Supp. 642; *Weatherby, Jacobs and Barker* v. *Jackson*, Mo. Sup., 358 Mo. 542, 215 S.W.2d 742; *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836.

In the latter two cases of Jacobs and Barker the Court held that the superintendent of insurance should allow plaintiffs' fees either as regular expenses of the insurance department under Sections 374.160 and 374.260, R.S. Mo. 1959, or as expenses of proceedings against insurance companies under Section 374.220, R.S. Mo. 1959, that said lawyers had a judicial or quasi judicial remedy by appeal from the Superintendent to the Circuit Court under the Missouri Administrative Procedure Act for his unreasonable delay in failure to act or upon action taken by him adverse to them.

Plaintiffs then formally renewed their claims pending before the Superintendent and demanded a hearing. 359 S.W.2d l.c. 796. The Superintendent then requested an opinion from the Attorney General and received the advice that "the circumstances of the present application may be such that a denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable

act." 359 S.W.2d l.c. 796. Thereafter the Superintendent, without notice or hearing, peremptorily dismissed said claim and denied any and all relief to said attorneys. 359 S.W.2d l.c. 796-7.

The Superintendent declared he could not allow plaintiff's fees as expenses of the insurance department to be paid out of current appropriations under Section 374.160, R.S. Mo. 1949, nor could he assess such fees as expenses of proceedings against such insurance companies under Sections 374.160 and 374.220, R.S. Mo. 1949 (Tr. 58, 144). *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 797.

Said attorneys then proceeding under the Missouri Administrative Procedure Act under authority of the Missouri Supreme Court, *en banc*, in the *Jacobs* and *Barker* cases, *supra*, filed a petition for review of said ruling of the Superintendent in the County of their residence, Jackson County, Missouri, as a contested case under Section 536.100, R.S. Mo. 1959, and as a precautionary measure filed two petitions for review of said ruling in the Circuit Court of Cole County, Missouri, as an uncontested case under Section 536.105, R.S. Mo. 1959. *State ex rel. v. Leggett*, Mo. Sup., 359 S.W.2d l.c. 796, 797.

The Superintendent obtained a Writ of Prohibition in the Jackson County case on the ground that the case was to be classified as uncontested under the statute and that sole venue was in Cole County as an uncontested case under Section 536.105. *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353; *State ex rel.* v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 797.

Said attorneys then pressed their petitions for review of the action of the Superintendent in the Cole County Circuit Court as an uncontested case. That Court then sustained motions of all defendants to dismiss said suits

and each count thereof on the grounds they failed to state facts upon which relief might be granted (Appendix A7, A8 Tr. 71, 72, 166-169). *State ex rel.* v. *Leggett*, 359 S.W.2d l.c. 791, 792.

Plaintiffs timely filed motions for new trial (Tr. 72, 73, 170-173). Said motions for new trial were overruled (Tr. 73, 173) and plaintiffs filed timely notices of appeal to the Supreme Court of Missouri (Tr. 74, 173-174).

After hearing, Division No. 1 of the Missouri Supreme Court affirmed the ruling of the trial court as to both petitions and all counts (359 S.W.2d 790; Tr. 413-428; Appendix A9).

Plaintiffs timely filed their joint motion for rehearing or in the alternative for transfer to the court, *en Banc*, for final hearing and decision (Appendix A27) (Tr. 430-443) which the Court overruled and denied (Tr. 444).

The Supreme Court of Missouri, *en Banc*, in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and in *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held it was the duty of the Superintendent of Insurance to hear, audit and allow plaintiffs' fees subject to their right of review in the Circuit Court under the Administrative Procedure Act. Division No. I of that Court in the opinion herein held the Superintendent of Insurance had no duty to hear, audit or allow plaintiff any fees and that there was no remedy for them under the Administrative Procedure Act and then refused to transfer the cause to the Court, *en Banc*, on plaintiffs' Motion thereby finally denying plaintiffs any remedy in the Courts of Missouri.

Thereafter on September 22, 1962, plaintiffs, having exhausted all remedies available to them in the Missouri State Courts, duly served on Respondents and filed in the

Supreme Court of Missouri their notice of appeal to this Court (Tr. 449-453) with proof of service on all adverse parties (Tr. 447).

Plaintiffs also filed in said Supreme Court of Missouri their motion for a stay of the mandate herein for a period of 90 days from September 10, 1962, which was sustained (Tr. 445-448).

The facts are more fully set out in the opinion of Division No. 1 of the Missouri Supreme Court herein (359 S.W.2d 790; Appendix A9) and in the plaintiffs' Petitions herein (Tr. 2-62, 82-123).

MANNER OF RAISING FEDERAL CONSTITUTIONAL QUESTIONS

Plaintiffs' amended claim in writing and on file and before the Superintendent when he dismissed plaintiffs' claim clearly presented the Constitutional issues (Tr. 38, 39, 123-125). Plaintiffs' petitions in the Circuit Court of Cole County clearly presented the Constitutional issues (Tr. 14, 15, 21, 97-99). Such records would seem to satisfy the requirements as to the propriety of the manner of raising the Constitutional questions.

The Missouri Courts have directly passed on the Constitutional questions in this case (359 S.W.2d l.c. 799, 800; and in the previous decisions of the court, *en Banc*, in *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 832, 835; *Barker* v. *Jacobs*, Mo. Sup., 295 S.W.2d 836, 840; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, 357, 358.

The Missouri Supreme Court is clearly in error herein in stating that the former decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs et al.* v. *Leggett*, 295

S.W.2d 825, 831 (5, 6) and *Barker et al.* v. *Leggett*, 295 S.W.2d 836, "recited facts and quoted from adjudicated cases clearly establishing that plaintiffs had long since waived any constitutional right granted under the 14th Amendment to the Constitution of the United States, * * *; and "that denial of the right to recover did not deprive plaintiffs of any timely pleaded constitutional right * * *." (359 S.W.2d, l.c. 795).

In discussing and ruling the Constitutional questions raised in the *Jacobs* case, *supra*, the Court, *en Banc*, said (295 S.W.2d, l.c. 832):

> "Plaintiffs further contend that they have been deprived of a judicial remedy, thereby denying them due process of law. The remedy denied is their alleged right to be paid out of the fund recovered."

Following the discussion of the Constitutional issues the Court further said (295 S.W.2d, l.c. 832):

> "We rule these assignments against the plaintiffs and hold that they have not been deprived of Constitutional rights."

The Court ruled that the Constitutional issues were alive at that time but that the denial of plaintiffs' right to be paid out of the fund recovered did not violate the Constitution.

In the *Barker* case, *supra*, the Court, *en Banc*, said (295 S.W.2d, l.c. 840):

> "As we have pointed out, administrative remedies are provided with right of judicial review. We have considered these constitutional questions and find them to be without merit."

Again the issue was the right of plaintiffs to be paid out of the fund recovered and the ruling therein that plain-

tiffs then had an administrative remedy necssarily meant a remedy not subject to be defeated on the Constitutional issues just considered and ruled by the Court.

In the subsequent case of *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, in a prohibition case on the question of venue dependent on whether these claims before the Superintendent of Insurance were contested or uncontested claims the Court *en Banc*, said (318 S.W.2d, l.c. 358):

> "The Legislature has now provided an adequate method of judicial review in all cases, namely: review under Sections 536.100 and 536.140 for cases which must be contested in a hearing in the agency before a decision is made; and review under Sec. 536.-150 for cases decided by the agency without a hearing. * * *
>
> "Due process is satisfied if there be either an administrative hearing or the right to have a hearing in a court which may adequately review the administrative decision."

(318 S.W.2d. l.c. 359:)

> "Since either statute provides adequate review to satisfy due process, what we said concerning plaintiffs' constitutional contentions therein was correct."

So again the Court, *en Banc*, recognized plaintiff's Constitutional issues were alive by ruling thereon and holding that an administrative review of plaintiffs' claim under either statute would satisfy the Constitutional requirements.

The Constitutional questions were actually raised, considered and decided by the Court, *en Banc*, in the *Barker*, *Jacobs* and *Jensen* cases, *supra*, and also by Division No. 1 in the present case.

This Court has said it will not concern itself with the time and manner of raising a Constitutional question where the Court below has actually considered and decided the issue as here. *Charleston Federal S. and L. Ass'n* v. *Alderson*, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627; *Raley* v. *State of Ohio*, 360 U.S. 423, 436, 79 S. Ct. 1257, 1265.

Whether a Federal Constitutional question is properly raised below is itself a Federal question. *Schuylkill Trust Co.* v. *Commonwealth of Pennsylvania*, 296 U.S. 113, 58 S. Ct. 31, 80 L. Ed. 91; *Staub* v. *City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302.

Courts indulge every reasonable presumption against waiver of a fundamental Constitutional right and do not presume acquiescence in the loss of such fundamental rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461; *Taylor* v. *United States*, D.C., Ct. App., 238 F.2d 259, 261; *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 777, 90 L. Ed. 939.

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Plaintiffs were employed by the Superintendent of Insurance with the approval of the Governor and Attorney General of Missouri to collect the unrefunded premiums from insurance companies collected by them in violation of a rate reduction order. They were to receive reasonable compensation for their services to be paid out of the fund collected. If they collected nothing they were to receive nothing (359 S.W.2d, l.c. 792).

The Cole County Circuit Court allowed plaintiffs a fee of $275,000.00 and declared it a lien upon the funds collected (359 S.W.2d, l.c. 793). The Superintendent appealed and the Supreme Court of Missouri, *en Banc* in

the case of *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, hold the "superintendent of insurance had a right to employ the respondents, but did not have the power to contract that their compensation should be paid out of this fund" for the reason that "in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata." (124 S.W.2d, l.c. 1167, 1168). The Court then said "the only way such attorneys can be paid is like any other expense of the insurance department, that is by appropriation of the legislature." (124 S.W.2d, l.c. 1168).

Plaintiffs thereafter from time to time over the years applied for an appropriation by the legislature with no success. (Tr. 8, 9; 359 S.W.2d, l.c. 795).

They were unsuccessful in their attempts to recover from the fund even after all rights of the policyholders had terminated and the remainder of the fund collected in the sum of $2,160,871.32 had escheated to the State (Tr. 30-32, 87-97). *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 834.

In the latter cases the Court, to escape the obvious unconstitutional effect of a ruling that a denial of any right of adjudication would produce pointed out that plaintiffs did have a remedy under the Missouri Administrative Procedure Act and indicated Section 536.100, R.S. Mo., 1949 as the applicable *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 840. Plaintiffs filed a petition for review in the Jackson County, Missouri, Circuit Court as a contested case, under Sections 536.100 and 536.110, R.S. Mo., 1949. The Superintendent applied to the Supreme Court of Missouri for a writ of prohibition on the ground the case was

not a contested case but an uncontested case with proper venue in Cole County and not in Jackson County. The Supreme Court of Missouri, *en Banc*, made its preliminary rule in prohibition permanent holding the case was not contested, but in answer to plaintiffs' claims of unconstitutionality pointed out plaintiffs had a remedy under Section 536.105 as an uncontested case. *State ex rel. Leggett v. Jensen*, Mo. Sup., 318 S.W.2d 353, 363, 359, 360.

Alerted by twenty years of frustration in attempting to collect a fee under a valid contract for services fully performed resulting in enrichment of the Missouri State Treasury in the sum of $2,160,871.32 as a windfall plaintiffs as a precaution had filed two suits for review of the Superintendent's ruling in the Cole County Circuit Court as uncontested cases under the Missouri Administrative Procedure Act (359 S.W.2d, l.c. 797). After the ruling there was no jurisdiction in the Jackson County Circuit Court plaintiffs pressed for action in the Cole County suits. All defendants filed motions to dismiss the Cole County suits which were sustained on the grounds plaintiffs' petitions, and each count thereof, failed to state claims upon which relief might be granted (Tr. 71, 72, 148-154, 166-169). In ruling said motions on that specific ground the Court overruled all other specifications in said motions. *Mosley v. St. Louis Public Service Co.*, Mo. Sup., 301 S.W.2d 797, 800 (2).

Upon appeal to the Missouri Supreme Court Division No. I the opinion herein affirmed the judgment below and held the refusal of the Superintendent to certify plaintiffs' fees for payment did not deprive plaintiffs of any legal or Constitutional rights 359 S.W.2d, l.c. 799, 800.

This is a Divisional opinion of Division No. I of the Missouri Supreme Court directly contrary to controlling

decisions of the Court, *en Banc*, in this same matter in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, all holding that plaintiffs do have a remedy under these very same statutes.

Furthermore, in so ruling and thereafter denying Appellants' motion for transfer to the Court, *en Banc*, Division No. I denied plaintiffs' recovery and refused to apply the controlling law of Missouri as announced by the Court *en Banc*.

In the case of *Smith* v. *St. Louis Public Service Co.*, 364 Mo. 104, 259 S.W.2d 692, the Court, *en Banc*, said (l.c. 694):

> "[1, 2] It is well settled 'that a decision of the court en Banc is controlling not only upon the appellate and all inferior courts, but upon the divisions of the Supreme Court as well. * * * Although the decision of a division of the court upon a given question is later in point of time than a decision of the court en Banc upon the same question the decision of the Court en Banc is nevertheless the controlling decision. If there is conflict between the later divisional opinion and the earlier decision of the court en Banc, it is the duty of all inferior courts, including the division of the Supreme Court itself, to follow the decision of the Supreme Court en Banc.' State ex rel. Hopkins v. Daues, 319 Mo. 733, 6 S.W.2d 893, 896 [1], Poe v. Illinois Cent. R. Co., 339 Mo. 1025, 99 S.W.2d 82, 84 [2]."

The previous applications of plaintiffs for an appropriation from the legislature have been made as suppliants and in the face of the opposition of the Superintendent of Insurance and his counsel. In the previous applications to the legislature plaintiffs had the support of the decisions of the Missouri Supreme Court holding that plaintiffs were

legally employed, had fully performed and had a legal right to be paid under the provisions of the Missouri Insurance Code.

In holding that the refusal of the Superintendent to allow plaintiffs' fees and certify them for payment under either Sections 374.160 and 374.260 or under Section 374.220, R.S. Mo., 1959, could not "be held to have deprived claimants of fees legally owed Barker and Jacobs", Division No. I not only refused to follow the controlling decisions of the Court *en Banc*, but deliberately and purposely foreclosed any judicial or quasi judicial remedy.

As the Department of Insurance is required to be self-sustaining (Sec. 374.160, R.S. Mo., 1959) and operates under a State Executive Budget Law (Art. IV, Sec. 22, Mo. Const., 1945) the decision herein forecloses any remedy to plaintiffs herein.

In the case of *Shelley* v. *Draemer*, 334 U.S. 1, 20, 68 S. Ct. 836, it is stated (l.c. 845):

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

In the case of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1261, the Court said (l.c. 1296):

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, the Court said (l.c. 270):

> "[1] In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Clearly the construction of these Statutes by Division No. I of the Missouri Supreme Court as affording plaintiffs no judicial or quasi judicial forum or remedy, followed by its blocking any review by the Court, *en Banc*, by denying appellant's motion for transfer to the Court, *en Banc*, in direct contradiction of previous controlling decisions of the Court, *en Banc*, denying plaintiffs any judicial or quasi judicial remedy for services rendered under a valid contract with such success as to bring into the State Treasury the sum of $2,160,871.32 as a windfall raise substantial Federal questions which have been presented to the Missouri judicial tribunals, but denied by them.

1. Denial of Access to a Judicial or Quasi Judicial Forum and a Judicial or Quasi Judicial Remedy As Denial of Due Process

The Division opinion herein denied plaintiffs all access to the Courts or quasi judicial tribunals and the right to a judicial or quasi judicial remedy, 359 S.W.2d 790.

In the case of *Barbier* v. *Connolly*, 113 U.S. 27, the Court in applying the Fourteenth Amendment said (l.c. 31):

> "* * * that all persons shall be equally entitled to pursue their happiness and acquire and enjoy property; that they shall have access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs, and the enforcement of contracts; * * *."

In the case of *Missouri v. Lewis*, 101 U.S. 22, the Court said (l.c. 30):

> "The Amendment (14th) could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several Courts at its discretion. • • • provided • • • it does not • • • deny to any person the equal protection of the laws, including the equal right to resort to the appropriate Courts for redress. • • • ."

In the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679-683, 50 S. Ct. 451, 454, the Court said (l.c. 454):

> "[4-10] Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U.S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U.S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.
>
> • • •
>
> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215."

"Fair play" is the essence of due process. *Galvan* v. *Press*, 347 U.S. 522, 530, 74 S. Ct. 737, 742, 98 L. Ed. 987.

It is not compatible with any normal concept of "fair play" to deny Barker and Jacobs a judicial forum and a judicial or quasi judicial remedy available to all others similarly situated.

Unjustifiable discrimination such as found here has been consistently held to be violative of due process. *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 694, 98 L. Ed. 884; *Detroit Bank* v. *United States*, 317 U.S. 329, 338, 63 S. Ct. 297, 301, 87 L. Ed. 304.

All persons have a Constitutional right to stand on an equality before the bar of justice in every American Court. 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716.

The Missouri Supreme Court held in this case that the above rule was not broad enough to cover Barker and Jacobs but labeled them as outcasts, with a right but no forum and no remedy available to them. The Fourteenth Amendment guaranteed plaintiffs the preservation of their substantial right to redress by some effective procedure. *Gibbs* v. *Zimmerman*, 290 U.S. 326, 332, 54 S. Ct. 140, 142, 78 L. Ed. 342. The action of the Missouri Supreme Court deprives them of that right.

2. Impairing the Obligation of Plaintiffs' Contract.

It stands conceded that plaintiffs had a valid contract of employment and that they rendered valuable services and fully performed their employment which netted the State of Missouri the sum of $2,160,871.32 (Tr. 6, 88, 89; 359 S.W.2d. l.c. 799).

Prior to the decision herein plaintiffs had a remedy for the enforcement of the obligation of their contract under

the provisions of the Missouri Insurance Code, with right of review under the Missouri Administrative Procedure Act. The Missouri Supreme Court, *en Banc*, so stated repeatedly. In *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, the Court, *en Banc*, said (l.c. 109):

> "The General Assembly by Section 5679 (now Sec. 374.160, R.S. Mo., 1959), also has provided by methods by which *all* the expenses of the Insurance Department must be paid. We cannot read into that section and distinction between 'current' expenses and 'emergency' expenses; nor can we find where attorneys fees are excepted."

The issue in that case was the right of Weatherby, an associate of Barker and Jacobs in this litigation to collect attorneys' fees for his services in the same litigation under an identical contract of employment.

In *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court, *en Banc*, held plaintiffs had a remedy under the Insurance Code with right of review under the Administrative Procedure Act.

The opinion herein holds plaintiffs have no remedy under the Insurance Code or under the Administrative Procedure Act; that no judicial or quasi judicial forum is open to them but their only remedy is by supplication to the legislature (a purely legislative body with no judicial powers) which has repeatedly turned them down on similar applications when they were not barred by a declaration by the Missouri Supreme Court that they had not been deprived of "fees *legally* owed Barker and Jacobs." (359 S.W.2d, l.c. 799).

As they were unable to obtain an appropriation by the legislature before, it is apparent their chances of such relief have been entirely eliminated by this new road-block of the Missouri Supreme Court. The legislature, having refused to respond before certainly cannot now be expected to appropriate public money to pay fees not "legally owed Barker and Jacobs." The suggested appeal to the legislature makes the "remedy a shadow" and violates plaintiffs' constitutional rights. *W. B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62, 55 S. Ct. 555, 557.

In the case of *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*, 316 U.S. 502, 544, 62 S. Ct. 1129, the Court said (l.c. 1135):

> "'The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice.' Pittsburgh Steel Co. v. Baltimore Eq. Soc., 226 U.S. 455, 459, 33 S. Ct. 167, 168, 57 L. Ed. 297."

The possibility of a legislative appropriation amounts to nothing in practice.

In the case of *Richmond Mortg. & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, the Court said (l.c. 339):

> "The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

The Court then states the limitations on changing the remedy as follows (l.c. 339):

> "The particular remedy existing at the date of the contract may be altogether abrogated if another equally

effective for the enforcement of the obligation remains or is substituted for the one taken away."

Here the remedy existing at the time of the contract is altogether abrogated with no other remedy substituted.

In *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 429-431, 54 S. Ct. 231, the Court said (l.c. 237):

"The obligation of a contract is the law which binds the parties to perform their agreement. Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. Ed. 529; Story, op. cit. Sec. 1378. • • •

"The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them (Sturges v. Crowninshield, supra, 4 Wheat. 197, 198, 4 L. Ed. 529) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights."

The opinion of Division No. I of the Missouri Supreme Court not only impaired substantial contractual rights but destroyed the contract.

Here it was action of Division No. I of the Missouri Supreme Court that impaired and in fact altogether abrogated plaintiffs' contract. This is state action calling for the same relief at the hands of this Court as if it had been by legislative action.

In the case of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1261, the Court said (l.c. 1296):

"The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

See to like effect: *Shelley* v. *Draemer*, 334 U.S. 1, 20, 68 S. Ct. 836, 845.

3. Equal Protection of the Law:

It was conceded that plaintiffs were lawfully employed, rendered valuable services to the Division of Insurance and fully performed their contract with great success. 359 S.W.2d l.c. 792, 799.

Under such circumstances under the law of Missouri plaintiffs were lawfully entitled to recover the reasonable value of their services under procedures set up under the Missouri Insurance Code, Chapter 374, R.S. Mo., 1959.

The rule generally applied is stated by this same Division of the Court in the case of *Nibler* v. *Coltrane*, Mo. Sup., 275 S.W.2d 270, as follows (l.c. 273):

> "Under the allegations of the second count, which alone was submitted to the jury, plaintiff sought to recover the reasonable value of the services of the type and kind mentioned and rendered under the circumstances alleged. From the facts alleged an inference can be drawn that the services were not gratuitously rendered and that they had not been paid for. It was therefore wholly immaterial that the express contract alleged in the first count or re-incorporated in the second count may have been void and unenforceable for the reasons mentioned by appellant."

Plaintiffs herein have heretofore been held by the Missouri Supreme Court, *en Banc*, to be entitled to recover reasonable compensation for their services in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Jacobs*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353.

In this case Division No. I of that Court holds that because plaintiffs' contract was for payment for services out of the fund collected and that part of the contract was unenforcible no fees were legally due them which could be recovered "as provided by Sections 374.160, 374.220,

374.230 and 374.260." 359 S.W.2d l.c. 799; that because there was no agreement or understanding that fees should be charged against the guilty insurance companies or paid as expense of the insurance department such statutory remedies were not available. 359 S.W.2d l.c. 799.

In so ruling Division No. I of the Missouri Supreme Court overlooked and failed to consider the fact the controlling decisions of said court, *en Banc*, in this very matter, based its rulings that plaintiffs were entitled to reasonable compensation on a rule of law and not on contract.

Such action and ruling was arbitrary and unreasonable State action following out a period of twenty years of arbitrary and unreasonable discrimination against Barker and Jacobs and denying them the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

At first plaintiffs were denied recovery out of the fund because it was a sacred fund for the policyholders. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164.

When it became apparent that there would be a large residue, far in excess of plaintiffs' fees, left after all policyholders who could be found were paid, the Court still denied plaintiffs the right to be paid out of said fund on the ground it had not lost its sacred character as a fund for policyholders. *Weatherby, Barker* and *Jacobs* v. *Jackson, Superintendent*, 358 Mo. 542, 215 S.W.2d 742.

After the money remaining in the sum of $2,160,871.32 had been escheated into the Missouri State Treasury free of policyholder the Missouri Supreme Court held the fund still retained its sacred character and was not available for payment of plaintiffs' claims. *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836.

Now after twenty years of denying Barker and Jacobs the right to be paid out of this fund recovered by their efforts Division No. I holds plaintiffs' only right to a claim was a claim against said fund which could not be enforced, and that the procedures and remedies provided by the statutes for all others having claims against the Superintendent of Insurance are not available to these plaintiffs. 359 S.W.2d l.c. 799.

Weatherby was paid from this fund $42,500 and Lauf and Cook were paid from this fund the sum of $100,000.00 for services rendered in connection with the fund. Suits were filed to recover this money back but compromised by permitting the recipients to keep the sums paid upon their waiving and releasing any other claims. (295 S.W.2d l.c. 828) Plaintiffs were paid nothing for services and were never reimbursed for their payment of the expenses of the litigation which netted the State of Missouri $2,160,871.32. (Tr. 28, 29, 6)

State ex rel. v. *Leggett*, Mo. Sup., 359 S.W.2d l.c. 792, 793.

Such action by Division No. 1 of the Missouri Supreme Court is unlawful, unreasonable, arbitrary, capricious, discriminatory and denies them due process of law and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States.

In denying plaintiffs the benefit of the forums and remedies provided by the Statutes of Missouri as afforded others similarly situated the Court brought the opinion herein into direct conflict with controlling decisions of this Court in the cases of *Missouri* v. *Lewis*, 101 U.S. 22, 30, 25 L. Ed. 989; *McCabe* v. *Railway*, 235 S.W.2d 151, 161, 35 S. Ct. 69, 59 L. Ed. 169; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923; *State of Missouri* v. *Canada*, 305 U.S. 337, 350, 351, 59 S. Ct. 232, 236, 237, 83 L. Ed. 208.

In the case of *Ohio Oil Company* v. *Conway*, 281 U.S. 146, 160, 50 S. Ct. 310, the Court in a tax case stated the general rule as follows (l.c. 314):

> "[4] With all this freedom of action, there is a point beyond which the State cannot go without violating the equal protection clause. The State may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The State is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989; Louisville Gas Co. v. Coleman, 277 U.S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770; Air-Way Corporation v. Day, 266 U.S. 71, 85, 45 S. Ct. 12, 69 L. Ed. 169; Schlesinger v. Wisconsin, 270 U.S. 230, 240, 46 S. Ct. 260, 70 L. Ed. 557, 43 A.L.R. 1224."

There does not appear to be the slightest justification for making a distinction between allowance of attorneys' fees to Jacobs and Barker and to other attorneys rendering legal services for the Insurance Division.

In the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, the Court, *en banc*, stated the general rule in Missouri as follows (l.c. 109):

> "The plaintiff Weatherby was employed by virtue of the statute to assist in enforcing the insurance laws of the state. The General Assembly, by Section 5679, also has provided the methods by which *all* the expenses of the Insurance Department must be paid. We can not read into that section any distinction between 'current' expenses and 'emergency' expenses; nor can we find where attorney's fees are excepted. The section provides two methods only for the payment of

> expenses: out of appropriations from earned fees, or by assessment against the companies. The reference in this section to 'proceedings against any company,' etc., becomes clear when read in connection with Section 5685, Revised Statutes Missouri 1929, Mo. St. Ann. Sec. 5685, p. 4348, which specifically provides the method for paying such expenses."

The Barker and Jacobs claims clearly come within such general rule but for no valid reason the Missouri Supreme Court has arbitrarily, capriciously and unreasonably discriminated against these claimants.

To meet the requirements of equal protection the law must apply to all alike. In holding this law applies to all except Barker and Jacobs the opinion herein is a clear denial of equal protection to these claimants. Denial of access to the Courts and a judicial remedy, as pointed out in the section of this brief immediately following, is a denial of equal protection of the law in violation of claimants' Constitutional rights.

In the case of *Hill* v. *State of Texas*, 316 U.S. 400, 406, 62 S. Ct. 1159, 1162, 86 L. Ed. 1559, the Court said:

> "Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand."

In the case of *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461, 57 S. Ct. 638, the Court said (l.c. 839):

> "'It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. Kentucky Railroad Tax Cases, 115 U.S. 321, 337, 6 S. Ct. 57, 29 L. Ed. 414; Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293, 18 S. Ct. 594, 42 L. Ed. 1037,

and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.'"

In the case of *Smith* v. *Cahoon*, 283 U.S. 553, 566-567, 51 S. Ct. 582, the Court said (l.c. 587):

> "The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.
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> • • •
>
> "But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right."

There is not here the slightest justification for making a distinction between Barker and Jacobs and other attorneys lawfully employed as they were under the Missouri Insurance Code. Denying them the benefits of the procedures of the Insurance Code with right of effective review under the Missouri Administrative Procedure Act in collecting fees for services rendered the Division of Insurance while making them available to others similarly situated is capricious, arbitrary, discriminatory and in violation of their rights under the Due Process clause of the Fourteenth Amendment.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of 28 U.S.C. 1257 (2) because there was drawn in question in the Missouri Courts the validity of statutes of the State of Missouri on the grounds of repugnancy to the Constitution of the United States and the decision of the Missouri Supreme Court was in favor of their validity.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City, Missouri,
Counsel for Appellants.

PROOF OF SERVICE

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Jurisdictional Statement on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 19th day of November, 1962.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 19th day of November, 1962.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 19th day of November, 1962.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 19th day of November, 1962.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Appellants.

UNITED STATES CONSTITUTIONAL PROVISIONS

Art. I. Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MISSOURI CONSTITUTIONAL PROVISIONS

Art. 4, Mo. Const., 1945.

§ 22. Department of revenue—director of revenue—division of collection—budget—comptroller—duties and functions.

Section 22. The department of revenue shall be in charge of a director of revenue, and shall have divisions of collection; budget and comptroller, and other divisions as

provided by law. The division of collection shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law. The division of the budget and comptroller shall assist the director of revenue in preparing estimates and information concerning receipts and expenditures of all state agencies as required by the governor and general assembly. The comptroller shall be director of the budget, and shall pre-approve all claims and accounts and certify them to the state auditor for payment.
Art. 4, Mo. Const., 1945.

§ 25. Limitation of governor's budget on power of appropriation.

Section 25. Until it acts on all the appropriations recommended in the budget, neither house of the general assembly shall pass any appropriation other than emergency appropriations recommended by the governor.

STATUTES

Section 536.105, R.S. Mo., 1949 provides:

"536.105. **Review by injunction or original writ, when —scope**

"1. When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, *certiorari*,

mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body such discretion lawfully exercised shall not be disturbed.

"2. Nothing in this section of this Act shall apply to contested cases reviewable pursuant to sections 536.100 to 536.140.

"3. Nothing in this section shall be construed to impair any power to take summary action lawfully vested in any such administrative officer or body, or to limit the jurisdiction of any court or the scope of any remedy available in the absence of this section. Laws 1953, p. 678, §§ 1, 2, 3."

Section 374.220, R.S. Mo., 1949, provides:

"374.220. **Expenses, how paid.**

"1. The expenses of proceedings against insurance companies, and examinations of the assets or liabilities and valuations of policies of insurance companies doing business in this state, shall be assessed by the superintendent upon the company proceeded

against or examined, or whose policies have been valued, and shall be in the first instance paid by such company, on the order of the superintendent directly to the person or persons rendering the service.

"2. If the company has been or shall be adjudged insolvent, or shall neglect, fail or refuse to pay the expenses, the superintendent may approve the payment of the expenses, in whole or in part, which shall be paid in like manner as other expenses of the insurance division; and the amount so paid, together with costs, charges and fees for collecting the same, shall be a first lien upon all the assets and property of such company, and may be recovered by the collector of revenue in any court of competent jurisdiction; or if said company be in liquidation, or process of being wound up, the costs and expenses of settling its affairs shall be allowed and taxed as costs against said company, and shall be a first lien upon and payable out of its assets. The collector of revenue shall deposit such sums in the state treasury to reimburse the insurance fund."

Section 374.260, R.S. Mo., 1949, provides:

"374.260. **Deficiencies, how met**

"In case the expenses of this division, including the salaries paid to the superintendent and deputy superintendent, shall exceed the amount collected under Section 374.230, the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess, which he shall collect and apply in like manner as by this chapter authorized and required in respect to the fees payable by such companies. Such assessments shall be made in proportion to the relative amounts of the assets of each company (R.S. 1939, § 5798)."

Section 374.120, R.S. Mo., 1949, provides:

"374.120. **Superintendent to appoint employees—legal adviser**

"1. He shall appoint and employ such clerks and clerical help which are necessary for a proper dispatch of the business of the department at salaries as now or hereafter provided by law, and may employ such actuarial work to be done as may be necessary, all of which expense shall be paid as provided for by Section 374.160, out of the amount appropriated by law from the fees collected by the insurance division.

"2. The attorney general shall be his legal adviser, but the superintendent may, with the approval of the governor, employ other counsel for the purpose of enforcing the insurance laws, except in criminal prosecutions.

"3. He may also employ suitable persons to make examinations as to the solvency of companies when he deems it necessary.

"4. He shall not employ any person in any capacity who is an officer, agent or employee of any insurance company or association (R.S. 1939, § 5788, A. 1949 H. B. 2115)."

Section 374.160, R.S. Mo., 1949, provides:

"374.160. **Expenses, how paid—state liability**

"All the expenses of the insurance division now or hereafter incurred and unpaid, or that may be hereafter incurred including the salaries of the superintendent and deputy superintendent, except the expenses of examinations, valuations or proceedings against any company, and for winding up, dissolving or settling the affairs of companies; which expenses are to be paid by the company, or as provided by the law, shall be paid monthly out of the amount ap-

propriated by law from the insurance division fund, on warrants issued upon such fund by the state auditor on vouchers approved by the superintendent and comptroller. The state shall not be responsible in any manner for the payment of any such expenses, or of any expenses of this division, or any charges connected therewith (R.S. 1939, § 5789, A. L. 1945 p. 1018)."

"374.230. **Fees—paid to collector of revenue**

Every insurance company doing business in this state shall pay to the collector of revenue the following fees:

(1) For an examination of the assets and liabilities of a company, not to exceed ten dollars per day for any one examiner, together with all necessary expenses incurred and actually paid and reported under oath of the examiner;

(2) For making valuations of policies or other obligations of assurance, not to exceed ten dollars for each million dollars of insurance, or fractional part thereof, for all ordinary forms of policies, and the cost of computing special evaluation tables for policy forms requiring such shall be added;

(3) For filing the declaration required on organization of each company, fifty dollars;

(4) For filing statement and certified copy of charter required of foreign companies, fifty dollars;

(5) For filing annual statement of any company doing business in this state, thirty dollars;

(6) For filing supplementary annual statement of any company doing business in this state, ten dollars;

(7) For filing any other paper required to be filed in the office of the superintendent, ten dollars each;

(8) For each agent's copy of his company's certificate of authority or license, two dollars;

(9) For copies of papers, records, and documents filed in the office of the superintendent, twenty cents per folio;

(10) For affixing the seal of office of the superintendent, one dollar (R.S. 1939 §§ 5795, 5796, A.L. 1945, p. 1018, A. 1949 H.B. 2115)."

JUDGMENT IN CASE No. 48717 IN THE COLE COUNTY, MISSOURI, CIRCUIT COURT

Thereafter, on December 12, 1960, the Court, again considering this cause, entered its Orders as follows:

Order

Now, on this 12th day of December, 1960, this cause is taken up by the Court for adjudication. The Court having previously heard arguments and considered the motion of defendant C. Lawrence Leggett, Superintendent of the Division of Insurance, to dismiss both counts of plaintiffs' First Amended Petition, finds that said motion should be sustained on the ground that both counts of said Petition failed to state a claim on which relief could be granted, and that both counts of plaintiffs' First Amended Petition should be dismissed as to defendant C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri.

It is therefore ordered that defendant's C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, Motion to Dismiss as to both counts of plaintiffs' First Amended Petition be sustained, and that both counts of Plaintiffs' First Amended Petition shall be dismissed as to defendant C. Lawrence Leggett, Super-

intendent of the Division of Insurance of the State of Missouri, and that the costs shall be taxed against plaintiffs.

Filed: December 12, 1960.

JUDGMENT IN CASE No. 48716 IN THE COLE COUNTY, MISSOURI, CIRCUIT COURT

And thereafter, on December 12, 1960, the Court, again considering this cause entered its Order as follows:

Order

Now on this 12th day of December, 1960, this cause is taken up by the Court for adjudication. The Court having previously heard arguments and considered the motion of defendant C. Lawrence Leggett, Superintendent of the Division of Insurance, to dismiss both counts of plaintiffs' First Amended Petition; finds that said motion should be sustained on the ground that both counts of said petition failed to state a claim on which relief could be granted and that both counts of plaintiffs' First Amended Petition should be dismissed as to defendant C. Lawrence Leggett, Superintendent of the Division of Insurance.

It is therefore ordered that defendant's, C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, Motion to Dismiss as to both counts of plaintiffs' First Amended Petition be sustained, and that both counts of plaintiffs' First Amended Petition shall be dismissed as to defendant, C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of Missouri, and that the costs shall be taxed against plaintiffs.

Filed: December 12, 1960.

Identical individual judgments were entered in favor of defendants, Aetna Insurance Company, State Farm Mutual Insurance Company and Hardware Mutual Casualty Company.

OPINION OF SUPREME COURT OF MISSOURI

HOLLINGSWORTH, Judge.

These are appeals by the legal representatives of John T. Barker and Floyd E. Jacobs, both deceased, from judgments of the Circuit Court of Cole County dismissing petitions of decedents for review of an order of the Superintendent of Insurance denying claims for attorneys fees allegedly owing Barker and Jacobs by the Division of Insurance since 1936.[1] Jurisdiction is in this court for the reasons that (1) more than $15,000 is involved in each case and (2) the Superintendent of the Division of Insurance (of Missouri) is a party defendant in each case. The first case, No. 48,716, in which the superintendent of insurance is the sole defendant, is an action for mandamus and certiorari. The second case, No. 48,717, in which the superintendent of insurance is sued and joined with him are the above named insurance companies, as representatives of certain classes of insurance companies against whom, it is alleged, an assessment of the fees herein sought could be made by the superintendent, is an action seeking a declaratory judgment and an injunction.

The facts are not in dispute. In one form or another, the basic questions here presented have been considered

1. Messrs. Barker and Jacobs died subsequent to the filing of their claims and their respective legal representatives have been duly substituted in their stead.

by this court on many occasions. In substance, as gleaned from the early case of *Aetna Insurance Company v. O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, the facts may be thus briefly stated: On October 9, 1922, the superintendent of insurance ordered a reduction of ten per cent in rates in this state on all classes of fire, lightning, hail and windstorm insurance effective November 15, 1922. Approximately 155 insurance companies filed a petition for review in the circuit court of Cole County. At the beginning of the review proceedings the trial court made an order, pursuant to a stipulation signed by attorneys for the companies and the insurance superintendent, allowing the companies to collect the old rate, on condition that in event the companies were unsuccessful they were to refund the excess premiums to the policyholders. The trial court found in favor of the companies. That judgment was reversed in this court, *Aetna Insurance Company v. Hyde*, 315 Mo. 113, 285 S.W. 65, and the mandate directed that the defendant (the superintendent of insurance) be restored all things he had lost by reason of the judgment of the trial court. In August, 1929, the companies began refunding the excess premiums collected by them under and by virtue of the stipulation and court order referred to. It, however, became apparent to the superintendent of insurance that only a portion of the excess collection of premiums was in fact refunded. In June, 1930, the superintendent of insurance, with the approval of the governor, acting under what is now § 374.120, R.S. Mo. 1959, V.A.M.S., employed John T. Barker and Floyd E. Jacobs to seek recovery of the balance of the excess premiums collected by the companies which belonged to the policyholders.[2]

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2. Statutory references, insofar as practicable, are to R.S. Mo. 1959, V.A.M.S.

The terms of the contract of employment were that if those attorneys were successful in recapturing this residue, they should be paid *from these funds* for their services such an amount as the court deemed adequate, but if they were unsuccessful in their efforts they were to receive no pay.[3] (On December 1, 1930, Glenn C. Weatherby, whose name will appear in some of the cases dealing with the facts involved, was also employed by the superintendent, with the approval of the governor, to aid Barker and Jacobs, on the same terms.)

Hearing of motions filed in the circuit court of Cole County in May, 1933, by Barker and Jacobs, resulted in a judgment rendered on December 7, 1935, against the companies requiring them to pay into court the sum of $2,750,000 in excess of the amount theretofore refunded, which was paid over to and held by the superintendent in accordance with Section 5874, R.S. 1929 (§ 379.390, R.S. Mo. 1959, V.A.M.S.), providing:

> "[U]ntil the final determination of such action, an amount equal to the difference between the rates fixed by the superintendent in his order and those in effect prior thereto, such funds to be held by the superintendent of insurance to await the result of such review, and in the event the orders and directions of the superintendent be set aside, such funds shall be returned to the companies pro rata, and in the event his orders and directions shall be sustained, then such funds shall be turned over to the policyholders pro rata."

Barker and Jacobs thereupon filed motions for allowance of fees out of the said fund of $2,750,000. The trial court made an allowance of 15 per cent as attorneys'

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3. Emphasis shown is that of this writer unless otherwise indicated.

fees out of the fund, allowing Weatherby the sum of $137,500, and Barker and Jacobs the sum of $275,000, and declaring a lien upon the fund for these amounts. The superintendent of insurance appealed to this court. The first question considered by this court in deciding the appeal was: Did the superintendent of insurance have the authority to employ the respondents in these restitution proceedings? In discussing that question, the court (in *Aetna Insurance Company* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1166) stated: "Before a state officer can enter into a valid contract he must be given that power either by the Constitution or by the statutes. All persons dealing with such officers are charged with knowledge of the extent of their authority and are bound, at their peril, to ascertain whether the contemplated contract is within the power conferred. Such power must be exercised in manner and form as directed by the Legislature. [Cases cited.]" The court in that case also quoted from 59 C.J. § 286, page 172: "Public officers have and can exercise only such powers as are conferred on them by law, and a state is not bound by contracts made in its behalf by its officers or agents without previous authority conferred by statute or the constitution, unless such authorized contracts have been afterward ratified by the legislature. An agreement not legally binding on the state may, however, impose a moral obligation. The doctrine of estoppel when invoked against the state, has only a limited application, even when an unauthorized contract on its behalf has been performed, and thereby the state has received a benefit, and so it is held that a state cannot by estoppel become bound by the unauthorized contracts of its officers, nor is a state bound by an implied contract made by a state officer where such officer had no authority to make an express one."

The court then stated, 124 S.W.2d loc. cit. 1167: "We hold that the superintendent did have a right to employ the respondents in the restitution proceedings. But it does not follow that the superintendent of insurance had a right to make a contract of employment that respondents were to be paid for their services *out of the fund restored to him.* It is to be noted that Section 5678 (§ 374.120), *supra*, does not specify how an attorney who has been employed by the superintendent is to be paid, nor is there any provision in the insurance code as to the method. 'A statute merely giving an official power to employ counsel with consent of the governor does not convey the right to fix his compensation, * * *.' 59 C.J. 174, Section 290. It, therefore, follows that the superintendent of insurance had a right to employ the respondents, *but did not have the power to contract that their compensation should be paid out of this fund.*"

In so holding the court cited and reasserted the principles of law announced in the case of *State ex rel. Missouri State Life Ins. Co.* v. *Hall, Judge*, 330 Mo. 1107, 52 S.W.2d 174, 177, which held: "The legislative power to authorize, supervise, regulate, and liquidate insurance companies rests on the interests of the public in the insurance business. It is conceded that the state may through administrative officers supervise and regulate insurance companies in aid of solvency. If so, it has the power to protect those interested, in the event of insolvency. It is a valid exercise of the police power through administrative officers. [Cases cited.] The power was first exercised in 1869 by the enactment of an Insurance Code intended to protect policyholders, stockholders, and the public. Laws 1869, p. 23. The original Code and amendments thereto indicate an intention to regulate the business from beginning to end thereby protecting individual and public interests.

The enactment of this comprehensive Code made the state a real party in interest. The superintendent of insurance is the administrative officer in charge of that interest, and courts are without authority to interfese with his administration of the Code."

The ultimate holding in *Aetna Ins. Co.* v. *O'Malley*, *supra*, 124 S.W.2d 1164, 1168, was: "The trial court being without authority to interfere with the insurance code of this state, it follows that it erred in allowing the respondents fees from the impounded fund." As above stated, Section 5678 (§ 374.120) *supra*, does give the superintendent of insurance, with the approval of the governor, authority to employ attorneys to enforce the insurance laws of this state, *yet the only way such attorneys can be paid is like any other expense of the insurance department, that is, by an appropriation of the legislature. • • • So, in the case at bar, the respondents must look to the legislature for the payment of their fees.*" The ruling in his case has been many times approved and until recently the ruling therein announced was no longer questioned. *Weatherby* v. *Jackson*, 358 Mo. 542, 215 S.W.2d 742, 743; *Jacobs et al.* v. *Leggett, et al.*, Mo., 295 S.W.2d 825; *Barker et al.* v. *Leggett*, Mo., 295 S.W.2d 836; and cases cited in each of them.

In 1941 (Laws 1941, p. 396; now § 379.395), the legislature passed an escheat statute dealing with unclaimed funds in the hands of the superintendent of the Division of Insurance. It provided, in substance, that, after diligent effort and failure to locate the owners of any funds (which included a very substantial portion of the funds in the hands of the superintendent recovered by Barker, Jacobs and Weatherby under the restitution proceedings), it was the duty of the superintendent to pay the same to the state treasurer, and that after allowing

a period of five years for the reclamation of any portion of said funds by any *owners* of a portion thereof, *the fund was to be transferred to the general revenue fund of the state.*

Thereafter, Weatherby, Jacobs and Barker filed suits to impress any unclaimed portion of these funds remaining in the hands of the state treasurer with a lien for their fees. Unsuccessful in the trial court, they appealed to this court. In an opinion disposing of those appeals, *Weatherby, Jacobs and Barker* v. *Jackson* (three cases), 358 Mo. 542, 215 S.W.2d 742, this court stated that plaintiffs did not ask the court to overrule the opinion written in *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, but relied upon the provisions of the escheat act. (The opinion in those cases also noted that the legislature had priorly recognized *its authority* to compensate attorneys employed by the superintendent of insurance in these cases by appropriating for the use and benefit of Messrs. Barker and Jacobs the sum of $150,000 [reduced by the governor to $100,000], as shown by Laws 1931, p. 69, § 11; and further noted that in the case of *Lucas* v. *Lamb*, 348 Mo. 900, 156 S.W.2d 634, loc. cit. 637, the court, anticipating early enactment of the escheat statute, had pointedly said: "If, as contended * * *, the State shall become the ultimate beneficiary of a part of this fund, the question of [Weatherby's, Jacobs' and Barker's] reimbursement *may be addressed to the General Assembly.*") The opinion then noted that there was no language in the escheat statute that could be construed to mean that the circuit court was given authority to allow attorney fees to any person and to order them paid out of this fund, which led the court to further note that the legislature was careful to protect the fund against any claims except those of persons or corporations *to whom the money actually belonged*, and

that the claims, if at all allowable, could only be allowed by the legislature; and further *"that the cost of litigation establishing these claims should not be assessed against the fund."*

The opinion, 215 S.W.2d 742, 744, then concluded with these words: "We therefore hold that the only authority given to the circuit court by the section in question is authority to determine whether the fund, or any part thereof, belongs to any person or corporation making claim therefor. The word, 'claim,' as used in the statute, was evidently used in such a restricted sense. Certainly, in view of the decisions of this court in the various cases, holding that the claimants in the present cases must look to the legislature for payment of their claims, and further, that the Circuit Court of Cole County has no jurisdiction to allow them, the legislature had it intended to vest the court with such jurisdiction, would have said so in plain and unmistakable language. Furthermore, there is no apparent reason why the legislature would vest the circuit court with such authority. The legislature in the past has appropriated money to pay attorneys and there is no reason why it cannot do so again if it deems the claims meritorious. *Whether they are, or are not, we have no authority to say in this case.*"

Therefore, Barker and Jacobs attempted from time to time to induce the legislature to appropriate additional funds to compensate them for services rendered in procuring restoration of $2,750,000 for the benefit of Missouri policyholders. Their efforts in that respect were unsuccessful. In 1951, the balance of the fund was transferred to the general revenue funds of the state.

In 1953, Jacobs and Barker, as plaintiffs, filed two other actions, both of which again sought recovery of these

fees. The first was against C. Lawrence Leggett, superintendent of insurance, and joined with him as defendants were the state treasurer, the state auditor and director of revenue. Count one of the petition in that case sought recovery of $275,000, such sum to be impressed as a lien on the aforesaid escheated funds, and for other relief. Count two thereof sought a declaratory judgment. The second suit was against the superintendent of insurance to recover *quantum meruit* the value of their services. Motions filed by the defendants in each case to dismiss were sustained in the trial court and both cases came on appeal to this court. The judgment of the trial court was affirmed in both cases. The court also held (in the first case) that the judgment denying plaintiffs' right to enforcement of a lien against the residue of the escheated funds did not deny plaintiffs of any timely pleaded constitutional right and that neither were they entitled to declaratory relief. The first case, 295 S.W.2d 825, 831 [5, 6] [7], also recited facts and quoted from adjudicated cases clearly establishing that plaintiffs had long since waived any constitutional right granted under the 14th Amendment to the Constitution of the United States, and Section 10, Article I, of the Constitution of Missouri, V.A.M.S. In the second case, the court held that an action *in quantum meruit* would not lie, that denial of the right to recover did not deprive plaintiffs of any timely pleaded constitutional right and that the escheat law was not an *ex post facto* law. See *Jacobs et al.* v. *Leggett et al.*, 295 S.W.2d 825, and *Barker et al.* v. *Leggett*, Mo., 295 S.W.2d 836, to which cases reference is made for a more extended statement bearing upon and pertinent to the conclusions herein reached.

During the course of the opinion in the second case, 295 S.W.2d loc. cit. 840, it was also stated: "We believe it is the intent of the insurance code to vest the superin-

tendent with primary jurisdiction to *approve* the usual expenses and to *assess* the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R.S. Mo. 1949, V.A.M.S., and more particularly § 536.100 dealing with judicial review of administrative decisions." (Emphasis is that shown in published opinion.)

Encouraged by the recognition given by this court of the right of review provided by the Administrative Procedure and Review Act, Chapter 536, Barker and Jacobs filed with the superintendent of insurance a new application for the allowance of said fees and for recovery of expenses incurred in connection with their services. This application presented in great detail the facts above outlined. See *State ex rel. Leggett* v. *Jensen, Judge*, Mo., 318 S.W.2d 353, 355. The principal relief sought was that the superintendent:

> "(a) Accept jurisdiction of and recognize these claims and this and preceding applications as merged herein.
>
> "(b) Proceed under the Insurance Code and Chapter 536, R.S. Mo. 1949, on notice to hear and determine this application and preceding applications praying allowance of the claims as set forth herein, and to hear evidence thereon.
>
> "(c) Allow and approve these claims as expenses of the Insurance Department in a full and adequate reasonable amount as may be justified by the evidence which will be presented by the applicants.
>
> "(d) Determine whether these claims and each of them (1) should be allowed as expenses of 'proceedings' against insurance companies involved in the

> restitution proceedings, and assessed against them ratably; or (2) are usual expenses of the Division (formerly Department) of Insurance payable out of amounts appropriated by law from the Insurance Division fund on warrants issued on such fund on vouchers approved by the Superintendent and Comptroller."

The superintendent thereupon sought advice both from the attorney general and from counsel for interested insurance companies as to the proper course of procedure. The attorney general gave it as his opinion that "under the provisions of Section 374.220, R.S. Mo. 1949, you do have jurisdiction to consider and determine the application now before you. As we have pointed out above, there is no statutory requirement that a hearing for such purpose be held. We think it obvious that the Superintendent is not required to hold a hearing on every claim or question that may be presented to him for determination. However, the circumstances of the present application may be such that denial of a hearing would be considered by a reviewing court to be an arbitrary and unreasonable act. Determination of the procedure is, we feel, primarily a matter within your discretion."

Thereafter, on February 7, 1958, the superintendent, declining to afford plaintiffs a hearing on said claims, advise plaintifts' counsel by letter as follows:

> "After a careful review of all the matters which have been submitted to me in connection with the above mentioned claims, I have concluded that I am not required by law to grant a hearing upon the applications before making a decision upon them.
>
> "Even though I am not required by law to grant applicants a hearing upon their claims before deciding them, I assume that I could grant such a hearing if

I thought the same would enable me better to rule upon the claims. However, it is my view that even though I should hold a hearing on these claims and should conclude after such hearing that applicants had been lawfully employed as claimed in the applications, and had rendered valuable services pursuant to said employment, the value of the services of claimants could not be allowed as expenses of the insurance department which could be paid out of current appropriations, as provided by Section 374.160, R.S. Mo. 1949, nor could the value of said services be assessed against insurance companies as expenses of proceedings against such insurance companies as contemplated by Sections 374.160 and 374.220 R.S. Mo. 1949.

"In view of the above, I am respectfully denying your application for a hearing upon these claims, and must deny the claim."

Deeming their application to be a "contested case", as that term is defined in § 536.010, plaintiffs filed a petition for review in the circuit court of the county of plaintiffs' residence, Jackson County, as required for review of "contested cases" under § 536.110. The superintendent of insurance, challenging plaintiffs' right to a review of the superintendent to grant them a hearing on their claim for fees under the provisions of § 536.100, sought prohibition against the judge of the circuit court of Jackson County from entertaining jurisdiction of the petition for review: *State ex rel. Leggett, Superintendent, v. Jensen, Judge*, Mo., 318 S.W.2d 353. In that case this court, by majority vote held that the application filed by plaintiffs for the allowance of fees in this case was not a "contested case" as defined in § 536.100 providing for judicial review in "contested cases", and that in view of the provisions of § 536.110 fixing the venue of petitions for review of "contested cases" in the circuit court of the residence of the

plaintiffs, the circuit court of Jackson County was without jurisdiction to determine the petition for review here in question. Rather, it was held, plaintiffs' petition for judicial review of the order of the superintendent denying them a hearing on the instant application for fees was authorized by the provisions of § 536.105 and venue of an action for review of any action taken under that section was in the circuit court of Cole County, *State ex rel. State Tax Commission* v. *Walsh*, Mo., 315 S.W.2d 830, 835, and the preliminary rule in prohibition was made absolute. Anticipating the possibility of such a ruling, the plaintiffs, in the meantime, had filed in the circuit court of Cole County the petition for review here under consideration. That petition made the following contentions:

> "The aforesaid decision and action of the defendant Superintendent constitutes a denial to Barker and Jacobs of due process of law, of a hearing and opportunity to be heard, and of equal protection of the law, all in violation of the constitutions of the United States and of the State of Missouri; defendant's refusal to hear, audit, allow, and provide for adequate payment of the claim of Barker and Jacobs violates their statutory and contractual rights and denies and deprives them of substantive and procedural rights as determined in the aforesaid opinions of the Missouri Supreme Court, rendered November 12, 1956; and, in addition, constitutes a violation of the rights of Barker and Jacobs under the constitutions of the United States and of the State of Missouri in the following respects:
>
> "(a) Such denial of recourse and payment to a person by an agency or official thereof exercising judicial or quasi-judicial functions constitutes an impairment of contract in violation of Article I, Section 10, Paragraph 1 of the Constitution of the United States and of sections 13 and 14 of Article I of the Constitution of Missouri, 1945.

"(b) Such refusal and denial of payment constitutes a deprivation of relators' liberty and property without due process of law in violation of Article I, Section 10, Constitution of Missouri, 1945, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States for the reason that Barker and Jacobs are denied and deprived of any judicial or other remedy for the enforcement of their legal, equitable, and property rights.

"(c) Such refusal and denial of payment constitutes a deprivation of the right of freedom of contract of Barker and Jacobs in violation of the Fourteenth Amendment of the Constitution of the United States.

"The aforesaid action of the defendant Superintendent in failing and refusing to entertain jurisdiction of and rule upon the claims of Barker and Jacobs from 1936 to February 7, 1958, constituted an unreasonable delay in deciding the case; and his decision and action in denying their application for allowance and payment thereof without giving them notice or a hearing, formal or informal, is unconstitutional, unlawful, unreasonable, arbitrary, capricious, involves and constitutes an abuse of discretion and rightful jurisdiction, and is *corgm non judice;* is unsupported by competent and substantial evidence upon the whole record; is in contravention of the aforesaid opinions of the Supreme Court of Missouri rendered November 12, 1956; and is contrary to the aforesaid opinion of the Attorney General of Missouri, the lawful legal advisor of the defendant Superintendent."

Section 536.105, which, in *State ex rel. Leggett* v. *Jensen*, Mo., 318 S.W.2d 353, we held controlling in the disposition of this case, provides:

"* * * and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was

entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; *but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.*

Several contentions here made by plaintiffs have heretofore been finally adjudicated against them, of which adjudications we take judicial notice:

1. No allowance can ever be made plaintiffs for the fees herein claimed out of the $2,750,000 returned to the superintendent of insurance for the benefit of the policyholders, even though substantial portions of said fund have, by law, escheated to and become the property of the state.

2. Any allowance made those plaintiffs can be made only by the legislature as provided by § 374.160, and within the limits and in the manner therein provided. See cases, *supra*.

3. Plaintiffs have not been deprived of any constitutional right impairing the obligation of a lawful contract in violation of Article I, § 10, of the Constitution of the United States or of Article I, §§ 13 and 14, of the Constitution of Missouri. See cases, *supra*.

4. The refusal of the superintendent to recognize and allow said fees does not constitute deprivation of plain-

tiffs' liberty and property within the due process clauses of the Constitution of the United States and of the Constitution of the State of Missouri or the right of freedom of contract in violation of the Fourteenth Amendment of the Constitution of the United States. See cases, *supra*.

[1] Assuming, as did the superintendent of insurance, that Barker and Jacobs had been lawfully employed as claimed in their respective applications and that they had rendered valuable services pursuant to their employment, the sole question remaining is: Did the superintendent err in holding that the value of their services could not be allowed as an expense of the insurance department which could be paid out of their current appropriation, as provided by § 374.160?

[2] We think nothing of value can be added to what we have long since and, in some instances, frequently held ever since *Aetna Insurance Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, decided in 1938. There we found and held that the contract for fees earned by Barker and Jacobs made such fees payable only from funds realized in the restitution proceeding; that the contract providing for the *payment of any such fees out of these funds was invalid*; that Barker and Jacobs were held chargeable with knowledge of that fact and were, therefore, prevented from recovering such fees from said funds under any theory of estoppel or otherwise.

It clearly follows that the very terms of the contract for fees negate, at least inferentially, their being made a legal charge against any other fund derived from any other source whatsoever. It was not shown, nor is it contended, that there was any agreement or understanding that such fees should constitute a charge against the insurance companies who had instituted the action to set

aside the rate increase. Neither was it shown, nor is it contended, that there was any agreement or understanding that such fees were to constitute an expense of the insurance department to be paid monthly out of warrants issued by the state auditor on vouchers approved by the superintendent and controller, as provided by §§ 374.160, 374.220, 374.230 and 374.260. And, certainly, we have not been cited to any law justifying a finding under the facts here shown that the refusal of the superintendent to allow and certify them for payment by either method can be held to have deprived claimants of fees *legally* owed Barker and Jacobs.

True, it has been suggested in one or more of the opinions rendered in these cases that the legislature could recognize a moral obligation to pay for these services and of its own volition assume a quasi-legal obligation to appropriate funds for the payment of them. The superintendent of insurance, however, is merely an official of the executive branch of the state government, with powers limited to the functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance.

[3] When the superintendent assumed as true the facts upon which the claims were asserted and denied them, he, in effect, reviewed and ruled them on their merits, as required by § 536.105. Such review clearly constituted due process. *State ex rel. Leggett v. Jensen*, Mo., 318 S.W.2d 353, 357 [3, 4]. Moreover, such review was not violative of Article I, §§ 13 and 14, of the Constitution of

Missouri. *Aetna Ins. Co.* v. *O'Malley*, and *Jacobs* v. *Leggett*, both *supra*.

The decision herein reached makes it unnecessary to discuss the further contentions and questions raised.

The judgment of the trial court dismissing the applications for fees is affirmed.

All concur.

And thereafter and on the 31st day of July, 1962, the following further proceedings were had and entered of record in said causes, to-wit:

State ex rel. Mildred B. Johnson, Admrx. of estate of John T. Barker, deceased, et al.,
Appellants,
48,716 vs.,
C. Lawrence Leggett, Supt. of Division of Insurance,
Respondent.

Mildred B. Johnson, Admrx. of estate of John T. Barker et al., Appellants,
48,717 vs.
C. Lawrence Leggett, Supt. of Division of Insurance et al.,
Respondent.

Come now the appellants, by attorney, and file a motion for a rehearing in the above entitled cause or, in the alternative, for a transfer to the Court *en Banc*, with suggestions in support of said motion with service shown.

Appellants' Motion for Rehearing or in the Alternative for Transfer to the Court *En Banc*, and Suggestions in Support of Appellants' Motion for Rehearing or in the

Alternative for Transfer to the Court *En Banc* are in words and figures following, to-wit:

APPELLANTS' MOTION FOR REHEARING OR IN THE ALTERNATIVE FOR TRANSFER TO THE COURT, EN BANC.

("Tr. I" refers to the transcript of the record on appeal in Case No. 44254, and "Tr: II" refers to the same in Case No. 44255.)

Come now the appellants herein and move the Court to set aside the Opinion and Judgments herein and grant them a rehearing in said consolidated causes or in the alternative transfer this cause to the Court, *in Banc*, because of material matters of law and fact overlooked or misinterpreted as shown by its opinion, and because of conflict between said opinion and controlling decisions of this Court, *en Banc*, and because of deprivation of rights guaranteed appellants by the United States Constitution and conflict with controlling decisions of the Supreme Court of the United States in the following particulars:

1. The Court overlooked and failed to consider appellants' alternative contention that Sections 374.160 and 374.260, R.S. Mo., 1949, and controlling decisions of the Supreme Court of Missouri, *in Banc*, not only authorize but impose on the Superintendent of Insurance the duty to hear the evidence and determine the amount of their fees, and to obtain an allowance from the Legislature for their payment by following the budgetary provisions of the Executive Budget System provided by Chapter 33, R.S. Mo., 1949, and by Article 4, Sections 22 to 28 inclusive. (summarized by Bishop, Government of Missouri

under Constitution of 1845, 1 Vernon's Annotated Missouri Statutes, l. c. 18, 19).

2. In holding that the Superintendent and the Courts of Missouri are powerless to enforce appellants' right to be paid for services admittedly performed under a valid contract of employment the Court in this Divisional Opinion brought this opinion into direct and irreconcilable conflict with the controlling decisions of this Court, *en Banc*, in the following cases: *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836; and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding appellants have a valid remedy by which to enforce their right to be paid under the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949.

3. In holding there was no way in which the Superintendent could provide for the payment of appellants, the Court brought this Divisional Opinion into direct and irreconcilable conflict with the controlling decision of the Court, *en Banc*, in the case of *State ex rel. Carwood Realty Co. et al. v. Dinwiddie*, Mo. Sup., 122 S.W.2d 912, 914, holding the Missouri Insurance Code provides the Superintendent with a comprehensive method to defray all the expenses of enforcing the insurance laws.

4. In refusing to take jurisdiction on the grounds that the Superintendent possessed no power to allow and provide for payment of plaintiffs, which was affirmed by the trial court and by this court, the Superintendent and the Courts denied plaintiffs access to the Courts and denied them a right to a judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States, and brought the opinion herein into direct and irreconcilable conflict with the controlling decisions of the Supreme Court of the United States as follows: *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L.Ed. 923, 925;

Lynch v. *United States*, 292 U.S. 571, 579, 580, 54 S. Ct. 840, 78 L. Ed. 1434; *Richmond Mortgage and Loan Corp.* v. *Wachovia Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552, 555.

In denying plaintiffs the right to enforce the contract the Superintendent and the Courts deprived plaintiffs of a judicial forum and not only impaired the obligation of their contract but denied them due process of law in violation of Article I, Section 10 and the Fourteenth Amendment to the Constitution of the United States and brought this opinion into conflict with the controlling decisions of the Supreme Court of the United States in the following cases: *Lynch* v. *United States*, 292 U.S. 571, 580, 54 S. Ct. 840, 78 L. Ed. 1434; *W. B. Worthen Co.* v. *Thomas*, 292 U.S. 426, 54 S. Ct. 816, 78 L. Ed. 1344; *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 55 S. Ct. 555, 79 L. Ed. 1298.

6. In denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949, afforded others similarly situated, the Superintendent and the Courts of this State have deprived these plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States and brought this opinion into direct conflict with controlling decisions of the Supreme Court of the United States in the following cases: *Missouri* v. *Lewis*, 101 U.S. 22, 30, 25 L. Ed. 989; *McCabe* v. *Railway*, 235 U.S. 151, 161, 35 S. Ct. 69, 59 L. Ed. 169; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923.

7. In denying plaintiffs any effective judicial remedy for the enforcement of their valid contract the Superintendent and the Courts of Missouri have struck down or ar-

bitrarily and substantially impaired plaintiffs' liberty to contract about their affairs, thereby violating their statutory rights, and depriving them of the right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States and bringing the opinion herein into conflict with controlling decisions of the Supreme Court of the United States in the following cases: *Adkins* v. *Hospital*, 261 U.S. 525, 545, 43 S. Ct. 394, 67 L. Ed. 785; *Coppage* v. *Kansas*, 236 U.S. 1, 14, 35 S. Ct. 240, 59 L. Ed. 441; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 429, 430, 54 S. Ct. 231, 237, 78 L. Ed. 413; *Richmond Corporation* v. *Bank*, 330 U.S. 124, 128, 57 S. Ct. 338, 339, 81 L. Ed. 552.

8. In holding the plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial enforcement of their contractual rights, which are also property rights, the opinion herein comes into direct conflict with the controlling decisions of the Supreme Court of the United States holding the obligation of contracts protected against impairment by the States includes the means of enforcement. *Von Hoffman* v. *Quincy*, 71 U.S. 535 (4 Wall. 535), 18 L. Ed. 403; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S 398, 429, 430, 54 S. Ct. 231, 78 L. Ed. 413; *Hall* v. *Wisconsin*, 103 U.S. 5, 10, 26 L. Ed. 302; *Faitoute Iron & Steel Co.* v. *City of Asbury Park, N. J.*, 316 U.S. 502, 62 S. Ct. 1129, 1135, 86 L. Ed. 1629; *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 36, 28 S. Ct. 7, 52 L. Ed. 78, 87; *Barbier* v. *Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 28 L. Ed. 923; *Richmond Corporation* v. *Bank*, 330 U.S. 124, 128, 57 S. Ct. 338, 81 L. Ed. 552.

9. In ruling (Opinion p. 9) that the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825 and *Barker* v. *Leggett*, 295 S.W.2d 836, recited facts and quoted adjudicated cases showing

plaintiff had long since waived any constitutional rights the Court overlooked and failed to consider the allegations of plaintiffs; petition that plaintiffs had unadjudicated claims pending continuously before the Superintendent with amendments from time to time from 1936, until the Superintendent denied and dismissed said claims on February 7, 1958 (Tr. I, 6-7, 16, 3-4; Tr. II, 8-9, 29-30, 13-14).

10. In ruling as mentioned above in Paragraph 9 the Court overlooked and failed to consider that the *Jacobs* and *Barker* cases, 295 S.W.2d 825, 836, the Court considered the constitutional questions and specifically ruled that plaintiffs' cases were not barred on constitutional grounds but were live cases and pointed out the appropriate judicial-administrative remedy for plaintiffs, 295 S.W.2d l.c. 832, 833, 835 (17), and 840 (5) under Section 536.105.

11. In holding plaintiffs' constitutional contentions had "heretofore been finally adjudicated against them" (Opinion pp. 14-15) the Court misconstrued the former decisions and overlooked the fact such rulings were limited to the holding plaintiffs could have no lien on the fund (*Jacobs* v. *Leggett*, 295 S.W.2d l.c. 831), and that in the last three decisions of the Court *en Banc*, to-wit: *Jacobs* v. *Leggett*, 295 S.W.2d 825, 832-833, 835 (17); *Barker* v. *Leggett*, 295 S.W.2d 836, 840 (5); *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, 358-359; the Court, *en Banc*, has held that plaintiffs are entitled to relief under either Section 374.220, R.S. Mo., 1949, or Section 374.260, R.S. Mo., 1939, with right of review under the Missouri Administrative Procedure Act, Section 536.105, R.S. Mo., 1949, as an uncontested case.

12. In holding (Opinion p. 15) the only question was:

"Did the superintendent err in holding that the value of their services could not be allowed as an

expense of the insurance department which could be paid out of their current appropriation, as provided by Sec. 374.150?".

The Court overlooked and failed to consider the fact plaintiffs were contending (Appellants' Brief pp. 44-46, 53-55) the superintendent had the right to elect to follow that method or collect it from the guilty companies by assessment as proceedings against insurance companies under Section 374.220, R.S. Mo., 1949, in accordance with the decisions of this Court, *en Banc*, in the case of *Jacobs* v. *Leggett*, 295 S.W.2d 825, 835; *Barker* v. *Jacobs*, 295 S.W.2d 836, 839; *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, 358-359, 364. In the Jensen case the Court said (l.c. 363):

> "Respondent has filed a motion for rehearing or for modification of the opinion herein. However, it is not contended that the opinion is wrong in holding that review must be under Sec. 536.105. (Statutory references are to R.S. Mo. and V.A.M.S.) Therefore, there is no occasion for a rehearing; but we will consider respondent's contentions concerning modification."

13. In holding Section 374.220, R.S. Mo., 1949, does not authorize the allowance of attorney's fees in proceedings against insurance companies (Opinion 15, 16) as is the situation here, this Court erred and brought the opinion herein into direct and irreconcilable conflict with the unanimous opinion of this Court, *en Banc*, in the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2), holding this statute authorizes the allowance of attorney's fees in proceedings against insurance companies as here. The *Jacobs*, *Barker* and *Jensen* cases, *supra*, all are based on recognition of such applicability of this statute.

14. In holding that appellants could not be paid out of current appropriation, as provided by Section 374.160,

R.S. Mo., 1949, this Court made an election the Superintendent did not make. The Superintendent elected to deny appellants any remedy under either 374.160 or 374.260 and did not make an election as between them (Opinion 11). In ruling as aforesaid the opinion herein is brought into direct and irreconcilable conflict with the controlling decisions of the Court, *en Banc*, in the cases of *Jacobs*, *Barker* and *Jensen*, all holding that one of said statutes or the other applied and that only the Superintendent had the right to determine which one applied.

Wherefore, appellants pray the Court to vacate and set aside the opinion and judgment against them herein and grant them a rehearing, or if that may not be done then they request that the cause be transferred to the Court, *en Banc*, for final determination of the issues herein in a manner that will resolve the Federal Constitutional issues and the conflicts between this opinion and the controlling decisions of this Court, *en Banc*, and also resolve the conflict between his opinion and the controlling decisions of the Supreme Court of the United States.

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SUGGESTIONS IN SUPPORT OF APPELLANTS' MOTION FOR REHEARING OR IN THE ALTERNATIVE FOR TRANSFER TO THE COURT, EN BANC.

Come now the appellants and re pectfully submit the following suggestions in support of their Motion for Rehearing or in the Alternative for Transfer to the Court *en Banc*.

The Court has overlooked the alternative of a hearing by the Superintendent and fixing of the amount of compensation reasonably payable for inclusion in the budget as other expenses of the Insurance Division (Opinion page 13, Appellants' Reply Brief pp. 9-11).

Assuming that the Superintendent of Insurance could constitutionally and lawfully refuse to assess the fees of appellants for services and at the same time could constitutionally and lawfully refuse to pay appellants out of current appropriations (which appellants deny) under no circumstances could the Superintendent as Chief Officer of the Insurance Division refuse to hear the evidence, formally or informally, and determine the amount of compensation earned, for inclusion in the Executive Budget. To send appellants "to the legislature" for payment without a preliminary determination of the amount and inclusion in the budget is not only an illusory remedy, but under our Constitution of 1945 is tantamount to a denial of all relief.

Under the 1945 Constitution Missouri adopted the Executive Budget System, Sections 22 to 28, inclusive, of Article 4, of the Constitution, implemented by Chapter 33, R.S. Mo. 1949. Under this system and particularly Section

25 of Article 4 of the Constitution, the legislature has no power, even if it desired to consider an appropriation for appellants in the ordinary course of business of the legislature in paying expenses of the Insurance Division, or even to consider a private relief bill for appellants.

Section 25 of Article 4 of the Constitution reads as follows:

> "§ 25. *Limitation of governor's budget on power of appropriation*
>
> Section 25. Until it acts on all the appropriations recommended in the budget, neither house of the general assembly shall pass any appropriation other than emergency appropriations recommended by the governor."

The nature of the Executive Budget System is explained in the leading New York case of *People* v. *Tremaine*, 252 N.Y. 27, 168 N.E. 817, where the Court said (l.c. 824):

> "'The provisions for a budget system is a new and complete article of the Constitution to be read in connection with all other provisions contained therein as the latest expression of the popular will. While it in no way limits the ultimate powers of the Legislature to make appropriations (Article IV-A, Sec. 4), it regulates the executive and legislative machinery, and defines the method whereby appropriations shall be made.'"

(l.c. 828:)

> "Whatever may have been done before, new methods were to be pursued upon the adoption of this amendment; laws in force at the time fell by the way —the Constitution was to override all of the laws and start with a clean sheet. Thus we find that the

head of each department of state government, except the Legislature and the judiciary, shall submit to the Governor itemized estimates of appropriations to meet the financial needs of such department, including a statement in detail of all moneys for which any general or special appropriation is desired from the Legislature. These shall be classified according to relative importance, and in such form as to give all the information the Governor may require. Copies of these estimates should be simultaneously furnished to the designated representatives of the appropriate committees of the Legislature for their information.'"

If appellants are to be paid "like any other expense of the Insurance Department" than the compensation reasonably payable for the services lawfully rendered must be determined and budgeted like any other expense of the Insurance Department, all of which are scheduled by the Superintendent and included in the budget, otherwise Section 25, of Article 4 of the Constitution intervenes and makes the injunction to seek legislative relief, advice to do the practically impossible. Even when unfettered by the Budget Act, the legislature has several times refused to grant relief to appellants. All of this points up the illusory character of the legislative remedy admittedly sought for years without avail (Opinion p. 8).

This denial to appellants of a judicial remedy to recover compensation earned under a lawful contract when the State of Missouri benefited from their services in the sum of $2,160,871.32; this ratification of the action of the Superintendent of Insurance in repudiating and refusing to pay his lawful debts and refusing to even give appellants a hearing or fix the amount of their compensation and employing the services of the Attorney General to defeat the honest and lawful claims of appellants is a shock-

ing situation, and especially when the situation is, such that this Court finds itself powerless to right this wrong.

This suggestion that appellants' only remedy is to go to the legislature with the disapproval and long and recorded opposition of the branch of the Executive Department concerned, is about as promising of success as to advise appellants to seek their pay in the pot of gold at the foot of the rainbow.

The record of this proceeding will be certain to cause great injury to the State in the future when it becomes necessary to employ special counsel to represent the public interest against powerful special interests.

All the other expenses of the Insurance Division are handled through the Executive Budget, as they must be. Why are lawfully employed lawyers who have rendered valuable services to the State different from vendors of supplies or persons rendering other services? The Court *en Banc* held lawyers were entitled to be paid the same way as other creditors in the case of *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2). We submit there exists no good and valid reason for this distinction and discrimination.

The denial to appellants of a remedy, judicial in character, before a Court or administrative agency, is in conflict with the controlling decisions of this Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825, *Barker* v. *Leggett*, 295 S.W.2d 836 and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, as pointed out in paragraphs 2, 9, 10, 11, and 12 of our Motion, *supra*.

The said denial of a judicial hearing and judicial remedy is also a violation of the Constitutional rights of appellants guaranteed to them under the Constitution of

the United States in that said denial impairs the obligation of their lawful and fully performed contract of employment (in violation of Article I, Section 10, of the United States Constitution) as pointed out under paragraphs 5, 7 and 8 of our Motion, *supra*. Said denial also deprives appellants of due process of law and denies appellants the equal protection of the law (in violation of the Fourteenth Amendment to the Constitution of the United States), as pointed out under paragraphs 4, 5, 6 and 7.

Among the decisions sustaining our claims of violation of our constitutional rights are the following:

In the case of *Lynch* v. *United States*, 292 U.S. 571, l.c. 579, 78 L. Ed. 1434, 1440, holding that:

> "'Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. When the United States enters into contractual relations, its rights and duties are governed generally by the law applicable to contracts between private individuals.'"

Barbier v. *Connolly*, 113 U.S. 27, l.c. 31, 28 L. Ed. 923, 925, holding that:

> "The Fourteenth Amendment * * * undoubtedly intended * * * that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts.'"

Hovey v. *Elliot*, 167 U.S. 409, 42 L. Ed 215, 221; *Dartmouth College* case, 17 U.S. 518, 4 L. Ed. 629, 645; *Truax* v. *Corrigan*, 257 U.S. 312, 332, 66 L. Ed. 254, 263.

Richmond Mortgage and Loan Corp. v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 81 L. Ed. 552, 556, where it was said:

> "'The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for reenforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as to seriously impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.'"

Hall v. *Wisconsin*, 103 U.S. 5, l.c. 8 and 10, 26 L. Ed. 302, 304, involved a substantially similar suit for services wherein it was held unconstitutional for Wisconsin to deny an effective remedy to a professional man lawfully employed. In that case the Supreme Court of the United States ruled against Wisconsin quoting Chief Justice Marshall's still authoritative language from *United States* v. *Maurice* as follows:

> "'Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer. * * * It would be a novel and startling doctrine to all these classes of persons that the government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.'"

Application of the constitutional guarantee mentioned above is inconsistent with the opinion in this case.

The ruling of this Court that appellants cannot be paid as any other expense of the Division of Insurance

(Opinion 15, 16) is in direct conflict with the controlling decisions of this Court, *en Banc*, in the *Jacobs*, *Barker* and *Jensen* cases, *supra*, all holding this is a decision only the Superintendent must make in electing whether to proceed under Section 374.220 or under Section 374.260, R.S. Mo., 1949. Here the Superintendent made no choice, but declined to apply either method and this Court now rules that he cannot proceed under Section 374.220 when all the Superintendent ruled was that he could or would not proceed under or independently of either. This Court has made a choice the Superintendent did not make, and which the Court *en Banc* has held only the Superintendent could make, and brought this opinion into direct conflict with the above controlling decisions of the Court, *en Banc*.

For all the reasons set forth above in these suggestions and in our Motion for Rehearing or in the Alternative for Transfer to the Court *en Banc*, we ask that the Court grant us a rehearing herein or in the alternative that the cause be ordered transferred to the Court, *en Banc*, for final determination.

Respectfully submitted,

Walter A. Raymond,
915 Grand Avenue,
Kansas City 6, Missouri,

and

Terence C. Porter,
317 Guitar Building,
Columbia, Missouri,
Attorneys for Appellants.

And thereafter, and on the 10th day of September, 1962, the following further proceedings were had and entered of record in said causes, to-wit:

State ex rel. Mildred B. Johnson, Admrx. of estate of John T. Barker, deceased, et al.,
Appellants,
48,716 vs.
C. Lawrence Leggett, Supt. of Division of Insurance,
Respondent.

Mildred B. Johnson, Admrx. of estate of John T. Barker et al.,
Appellants,
48,717 vs.
C. Lawrence Leggett, Supt. of Division of Insurance et al.,
Respondent.

Now at this day the Court having seen and fully considered the motion of the appellants for a rehearing in the above entitled consolidated causes or, in the alternative, to transfer said causes to the Court *en Banc*, doth order that said motion be, and the same is hereby overruled.

And thereafter, and on the 22nd day of September, 1962, the following further proceeding was filed in said causes, to-wit:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

I. Notice is hereby given that the State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs in case No. 48,716, and Mildred B. Johnson, Administratrix of the Estate of

John T. Barker, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, in case No. 48,717, Appellants above named which were consolidated and ruled as one case, hereby appeal to the Supreme Court of the United States from the final order and judgment of Division No. I of the Supreme Court of Missouri, it being the highest Court in the State of Missouri in which a decision could be had by reason of the fact Division No. I of said Court overruled the Motion for rehearing of these Appellants and their alternative motion for transfer to the Supreme Court of Missouri, *en Banc* thereby precluding a hearing before the Court, *en Banc*; said order and judgment was entered on July 16, 1962, affirming the order and judgment of the Cole County, Missouri, Circuit Court, dismissing Plaintiffs' petitions as failing to state cause of action; and said motion for rehearing or in the alternative for transfer to the Court, *en Banc*, was denied on September 10, 1962.

This appeal is taken pursuant to Title 26, U.S.C.A., Section 1257. Case No. 48,716 was an action for mandamus and certiorari and case No. 48,717, was an action for declaratory judgment and injunction. The Trial Court sustained motions to dismiss Plaintiffs' petitions in both cases on the grounds of failure of said petitions to state facts upon which relief might be granted. The Missouri Supreme Court affirmed the ruling of the Trial Court.

II. The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. A true copy of the typewritten transcripts of the record on appeal filed in the Supreme Court of Missouri in said cases.

2. A true copy of the opinion and judgment of Division No. I of the Supreme Court of Missouri as adopted and promulgated by the Court, *en Banc*, as its opinion and judgment.

3. A true copy of the typewritten motion of Appellants for a rehearing or in the alternative transfer to the Supreme Court of Missouri, *en Banc*, filed in Division No. I of the Supreme Court of Missouri in said cases.

4. A true copy of the order overruling Appellants' motion for rehearing or in the alternative transfer to the Court, *en banc*.

5. True copies of all printed briefs filed by the parties in Division No. I of the Supreme Court of Missouri in said cases.

6. True copies of all entries in the records of the Clerk of the Supreme Court of Missouri in these cases in connection with the application for rehearing or in the alternative for transfer to the Court, *en Banc* and this appeal.

7. A true copy of this notice of appeal.

8. A true copy of application for stay of mandate and order thereon.

All to be included under the certificate of the Clerk of the Missouri Supreme Court in accordance with procedures in appeals from the Supreme Court of Missouri to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

1. Whether the Superintendent of Insurance, the Trial Court and Division No. 1 of the Missouri Supreme Court, in holding the Superintendent of Insurance and

the Courts of Missouri are powerless to enforce Plaintiffs' right to be paid for services admittedly fully performed under a valid contract in direct conflict with controlling decisions of the Missouri Supreme Court, *en Banc*, in *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836, and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, holding they do have a specific remedy under Section 536.105, R.S. Mo., 1949, of the Missouri Administrative Procedure Act, are not arbitrary, capricious, discriminatory and deny Plaintiffs equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether in refusing to take jurisdiction and grant Plaintiffs relief on the grounds the Superintendent possessed no power or authority to allow and provide for payment of Plaintiffs' claims for services, the Superintendent, the Trial Court and Division No. 1 of the Missouri Supreme Court denied Plaintiffs access to the Courts and denied them a right to a judicial remedy in violation of the Fourteenth Amendment to the Constitution of the United States?

3. Whether in denying Plaintiffs the right to enforce the admittedly valid contract admittedly fully performed the Superintendent, the Trial Court and Division No. 1 of the Missouri Supreme Court deprive Plaintiffs of a judicial forum and not only impaired the obligation of their contract but denied them due process of law in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

4. Whether in denying plaintiffs the benefit of the Administrative Procedure Act, Chapter 536, R.S. Mo., 1949, afforded others similarly situated and which the Supreme Court of Missouri, *en Banc* in the cases of *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836,

and *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353, held applicable, the Superintendent, the Trial Court and Division No. I of the Missouri Supreme Court have acted arbitrarily, discriminated against these Plaintiffs and deprived these Plaintiffs of the "equal right to resort to the appropriate courts for redress" in violation of the Fourteenth Amendment to the Constitution of the United States?

5. Whether in denying Plaintiffs any judicial remedy for the enforcement of their admittedly valid contract fully performed the Superintendent, the Trial Court and Division No. I of the Supreme Court of Missouri have struck down or arbitrarily and substantially impaired Plaintiffs' liberty to contract about their affairs, thereby discriminating against them and violating their statutory rights, and in doing so deprived them of their right to contract guaranteed them under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

6. Whether in holding the Plaintiffs had a valid contract and were entitled to be paid but denying them the right to judicial enforcement of their contractual rights, which are also property rights, the opinion and judgment herein are capricious, arbitrary and discriminatory and deprive plaintiffs of their right to be protected against impairment by the State including the means of enforcement in violation of Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States?

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Kansas City 6, Missouri,
and
Terence C. Porter,
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Columbia, Missouri,
Attorneys for Appellants.

Office Supreme Court, U.S.
FILED
DEC 12 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,
Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri, et al.,
Appellees.

Appeal from the Supreme Court of Missouri.

SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, AETNA INSURANCE COMPANY, A CORPORATION.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,
Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri, et al.,
Appellees.

Appeal from the Supreme Court of Missouri.

SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, AETNA INSURANCE COMPANY, A CORPORATION.

Aetna Insurance Company, one of the appellees in the above entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves

that the final judgment of the Supreme Court of Missouri be affirmed or, in the alternative, that the appeal herein be dismissed upon the following grounds:

(1) There was not drawn into question the validity of any State statute on the ground of its being repugnant to the Constitution of the United States, so there was no decision in favor of its validity.

(2) No substantial Federal question is involved.

(3) The judgment appealed from is based on a question of fact, the interpretation of a contract, and not of law and is not reviewable by this Court.

(4) The judgment rests on an adequate non-Federal basis, and the case requires no further argument.

STATEMENT.

This is a direct appeal from the final judgment of the Supreme Court of Missouri in two actions consolidated for argument in the Supreme Court and disposed of by the Court in one opinion and in one judgment which affirmed the judgments of the trial court, Circuit Court, dismissing the petitions of Messrs. Barker and Jacobs for attorneys' fees. **State v. Leggett**, 359 S. W. 2d 790. Barker and Jacobs died during the pendency of the cases in the Circuit Court and their respective legal representatives were substituted in their stead.

This case is the most recent in a long series of cases over the same subject matter which stemmed from the decision of the Supreme Court of Missouri in **Aetna Ins. Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, decided in 1938. The opinion in that case recites that Barker and Jacobs were employed by the Superintendent of Insurance to recover certain excess premiums collected by fire and windstorm insurance companies after a rate reduction order. The contract of employment provided if Barker and Jacobs were successful in recovering such funds they should be compensated for their services from the funds so recovered in such an amount as the trial court might deem adequate.

Funds in excess of $2,750,000 were paid into the Circuit Court by the insurance companies and Barker and Jacobs were allowed a fee of $275,000 by the Circuit Court which was declared a lien upon the funds. On appeal from this allowance, the Supreme Court held that while the Superintendent of Insurance had a right to employ Barker and Jacobs to recover funds in the restitution proceedings, he had no authority to contract that they should be paid for their services out of the funds restored to him, and held the Circuit Court erred in allowing such fees from the

funds so recovered. The Supreme Court then added that the only way the attorneys could be compensated would be by an appropriation by the legislature.

While appellants claim they have received nothing, the fact is Barker and Jacobs received $100,000 through an appropriation by the legislature (359 S. W. 2d 790, 794), and from time to time sought additional appropriations (359 S. W. 2d 790, 795).

In one form or another, the Supreme Court has considered the basic questions involved in this case on many occasions (359 S. W. 2d 790, 792).

In a prior case involving these same claims, namely, **Barker v. Leggett**, 295 S. W. 2d 836, 840, after denying recovery, the Supreme Court said:

"We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to **approve** the usual expenses and to **assess** the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R. S. Mo. 1949, V. A. M. S., and more particularly § 536.100 dealing with judicial review of administrative decisions." (Emphasis is that shown in published opinion.)

The reference in the above quotation to "§ 536.100, R. S. Mo. 1949, V. A. M. S., was obviously inexact because such section applies to administrative review only in so-called "contested cases", as defined in § 536.010, R. S. Mo. 1949, and does not comprehend the type of decision by the Superintendent of Insurance here involved because no hearing on such decision is required. Review of this type of decision is by suit de novo in the Circuit Court as pro

vided in § 536.105, R. S. Mo. 1949, V. A. M. S. This section number 536.105 is used at times in the opinion of the Supreme Court in the instant case although the present applicable section number is § 536.150, R. S. Mo. 1959.

After the decision in **Barker v. Leggett**, 295 S. W. 2d 536, appellants filed anew, in writing, their claims for attorneys' fees with the Superintendent of Insurance who reviewed and denied them on their merits, 359 S. W. 2d 790, 800. Thereupon, appellants filed suits to review the Superintendent's denial of their claims in the Circuit Court under § 536.150, R. S. Mo. 1959. Upon dismissal of their suits by the Circuit Court for failure to state a claim upon which relief could be granted, appellants appealed to the Supreme Court of Missouri which, after briefs and hearing, affirmed the Circuit Court, and its unanimous decision is the subject of this appeal.

For a complete statement of the facts in this case which are not in dispute, and for a history of previous litigation in the Supreme Court of Missouri, we refer to the opinion in this appeal, 359 S. W. 2d 790.

ARGUMENT

This Court Has No Jurisdiction of This Appeal.

An examination of the record and the opinion clearly shows that the validity of a state statute was not drawn in question on any ground whatever. Consequently, there was no decision in favor of or against the validity of any state statute.

No Substantial Federal Question Is Involved.

Appellants Have Not Been Denied Due Process.

Appellants charge they were denied due process because: "The Division Opinion herein denied plaintiffs all access to the Courts or quasi judicial tribunals and the right to a judicial or quasi judicial remedy. 259 S. W. 2d 790." Jur. Stat. 2.

Such charge is directed against the ruling on the merits of appellants' claims based on appellants' contract of employment. The interpretation of this contract presents no Federal question.

The opinion refers to the previous case of **Aetna Insurance Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, decided in 1938. The opinion here states the Court in that case held, and the Court has frequently held ever since, that the contract for fees earned by Barker and Jacobs made such fees payable only from funds realized in the restitution proceedings; that the contract providing for the payment of any such fees out of such funds was invalid; that Barker and Jacobs were held chargeable with knowledge of that fact and were, therefore, prevented from recovering such fees from said funds under any theory of estoppel or otherwise. The opinion continues, it was not shown or contended that there was any agree-

ment the fees should constitute a charge against the insurance companies or should constitute an expense against the insurance department. Thus the Court found appellants under the terms of their contract were barred from receiving payment and Barker and Jacobs were not deprived of fees legally owed to them. **State v. Leggett**, 359 S. W. 2d 790, 799.

Surely the decision against appellants that under the terms of their contract they cannot recover in this case is not a proper ground for a claim of denial of due process. The final judgment of the Court against appellants based on the interpretation of their contract, the very foundation of their claims, should bring this litigation to an end. What further access to the courts and tribunals and what further remedies should appellants be entitled to?

In **Jacobs v. Leggett**, 295 S. W. 2d 825, 832, the Court said on this very same contention by the same parties: "The right of contract is not unqualified and absolute, but is subject to reasonable regulation and restriction in the public interest." **West Coast Hotel Co. v. Parrish**, 300 U. S. 379, 392-3; **Yeiser v. Dysart**, 267 U. S. 540."

And to go back again to **Aetna Insurance Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, 1168, the Court held there that the Missouri Insurance Code providing for the supervision and regulation of insurance companies rests in the public interest, and is a valid exercise of the police power through administrative officers. After finding that the impounded fund should be turned over to the policy holders, the Court ruled: "The trial court being without authority to interfere with the insurance code of this state, it follows that it erred in allowing the respondents fees from the impounded fund."

Appellants have enjoyed access to the courts since the original case on their claims for fees in 1938 and to every

remedy ingenious counsel could devise. The opinion in this case lists six prior Supreme Court cases on these very same claims.

In the present proceedings appellants first submitted their claims in writing to the Superintendent of Insurance for review. The Superintendent reviewed the claims without a hearing and denied them, holding he had no authority to allow them under the provisions of the Missouri Insurance Code. In the previous related case of **State v. Jensen**, 318 S. W. 2d 353, 358-9, the Supreme Court held there was no statutory requirement that the Superintendent hold an oral hearing on such claims as these, before ruling on the claims. Thus, appellants pursued their remedy under the Insurance Code, and were accorded a proper review by the Superintendent. **State v. Leggett**, 359 S. W. 2d 790, 806.

Thereafter, appellants instituted two suits in the Circuit Court to review the action of the Superintendent under 536.150, R. S. Mo. 1959, of the Administrative Procedure Act. Motions to dismiss appellants' petitions were filed, argued and briefed in that Court. The Circuit Court dismissed the petitions for failure to state claims upon which relief could be granted. Accordingly, appellants exercised their right of review under the Administrative Procedure Act. From the judgments of dismissal the appellants appealed to the Missouri Supreme Court. The cases were briefed and argued before Division 1 of that Court, resulting in the opinion and judgment in favor of appellees now on appeal to this Court.

Even if the decision of the Missouri Supreme Court might be assumed to be erroneous, still appellants may not properly claim it deprived them of due process. In the case of **Ex parte Converse**, 137 U. S. 624, discussing due process this Court held: "But the State cannot be deemed guilty of a violation of its obligations under the

Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction." Appellants have not raised any jurisdictional questions about the decision here appealed from.

Appellants argue that since "fair play" is the essence of due process, it is not fair play to deny Barker and Jacobs a judicial forum and a judicial remedy available to all others similarly situated as they claim the decision on appeal has done. We have demonstrated, supra, that Barker and Jacobs have not been denied due process.

It seems to us that the principle of fair play should also be applicable to appellee Aetna Insurance Company and to all the other insurance companies constituting the class Aetna represents. On a motion for restitution sustained by the Circuit Court of Cole County, Missouri, Aetna and the other insurance companies paid into court the full amount of the judgment for restitution in excess of $2,750,000 in 1935, **Aetna Ins. Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, 1166. On February 18, 1936, the Court discharged Aetna and all other insurance companies and sureties "of all further liability of every kind and character arising from the restitution proceeding." **Aetna Ins. Co. v. O'Malley**, 342 Mo. 800, 118 S. W. 2d 7, 7.

After paying the judgment in full into the Circuit Court and being discharged from all further liability, is it conceivable that fair play would require Aetna and the other insurance companies now to pay Barker and Jacobs their attorneys' fees for services in the case which discharged Aetna and the other insurance companies from all further liability? This, after more than 26 years, Barker and Jacobs are now attempting to accomplish through an assessment by the Superintendent against Aetna and the other insurance companies. We submit no principle of fair play and justice should permit this.

This Court in **Shelley v. Kraemer**, 334 U. S. 1, 22, said: "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."

If fair play is the essence of due process, the same must be true of due process.

Appellants make numerous charges that the decision in the instant case is in conflict with previous decisions of the Court **en Banc** and fails to follow controlling decisions of the Court **en Banc** in that such decisions have held that the Superintendent of Insurance should allow appellants' claims for fees, and have held that appellants are entitled to recover reasonable compensation. The decisions relied on to sustain these charges are **Jacobs v. Leggett**, 295 S. W. 2d 825; **Barker v. Leggett**, 295 S. W. 2d 836 and **State v. Jensen**, 318 S. W. 2d 353.

These decisions afford absolutely no support whatever for appellants' charges as a reading of them will readily disclose. In no instance did these cases attempt to decide the merits of the claims. In both the Jacobs and the Barker cases the judgments of the trial court dismissing the cases were affirmed. In **State v. Jensen**, 318 S. W. 2d 353, 364, the Court said: "However, we have not decided on the merits of plaintiffs' [Barker and Jacobs] claims or the method by which they may be paid."

Appellants also claim in the three cases above cited the Court **en Banc** held appellants had a remedy under the Insurance Code with a right of review under the Administrative Procedure Act. We have shown earlier in this motion that appellants exercised both their remedy and their right of review.

Appellants have relentlessly pursued every remedy available to them. At no point in this protracted litigation have the appellants been denied access to the courts or

to administrative agencies. Time and again the appellants' claims have been presented, heard and ruled against them. There is no conceivable basis for appellant's claim of denial of due process in these circumstances.

B. Judgment Did Not Impair Obligation of Plaintiffs' Contract.

Appellants contend "The opinion of Division No. 1 of the Missouri Supreme Court not only impaired substantial contractual rights but destroyed the contract". Jur. Stat. 28.

In this case no legislative action by the state is involved, or even claimed to have impaired the obligation of appellants' contract. Appellants base their contention of impairment solely on the Court's judgment.

It has been settled by a long line of decisions that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed against impairment by legislation and not by judgments of courts. **Barrows v. Jackson**, 346 U. S. 242, 260; **Tidal Oil Co. v. Flanagan**, 263 U. S. 444, 451; **Kryger v. Wilson**, 242 U. S. 171, 176.

Under the principle announced in these cases there is no Federal question of the impairment of the obligation of plaintiffs' contract in this appeal.

C. Appellants Were Not Denied Equal Protection of the Laws.

Appellants repeat the charge that Division 1 in this case failed to follow the rulings of the Court *en Banc* in **Jacobs v. Leggett**, 295 S. W. 2d 825; **Barker v. Leggett**, 295 S. W. 2d 836; and **State ex rel. Leggett v. Jensen**, 318 S. W. 2d 353. Appellants again argue these cases held they were entitled to recover reasonable compensation for their serv

ees on a rule of law and not on contract. We flatly assert these cases made no such ruling and again suggest a reading of these decisions will demonstrate this to be true.

Appellants claim the Court has discriminated against them by denying them fees for their service while other lawyers, namely, Weatherby, Lauf and Cook received compensation for their services. There is nothing in the record in this case or in the opinion that shows this matter was ever raised or considered in this case. It has been interjected for the first time in this appeal. Even if the matter were properly before this Court, appellants' contention, is totally without substance.

Appellants have heretofore advanced the same argument that payments made to the above named lawyers while denying payments to appellants deprived them of equal protection of the laws in the case of **Jacobs v. Leggett**, 205 S. W. 2d 828. The opinion in that case considered the payments to these lawyers (l. c. 828), and then ruled: "They [appellants] contend that they have been denied equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States in that Weatherby and Lauf and Cook by way of settlement were permitted to keep the sums which had been paid to them out of the fund prior to the decisions of this court holding such payments illegal. Our decisions have uniformly held that the fees of Weatherby and of Lauf and Cook, as well as the plaintiffs, could not lawfully be paid out of the funds." (l. c. 831)

The opinion then quotes with approval from **Barker v. Leggett**, 102 F. Supp. 642, 643 (D. C., Mo.), where the same argument was made by one of these appellants as follows: "The contention of plaintiff that he is being denied the equal protection of the law, because the State has not compelled Lauf, Cook and Weatherby to repay

to the fund the various sums paid to them, but, on the contrary, has compromised litigation instituted by the State looking to that result, is without merit. In Weatherby's case, supra, and in Aetna Ins. Co. v. O'Malley, 342 Mo. 880, 118 S. W. 2d 3, the payments so made from the fund to said parties were held to be illegal under State law by the Supreme Court of Missouri. The refusal of the State to countenance further illegal payments to be made from the fund in question cannot be held a denial of equal protection of the law. Meyer v. Territory of Hawaii, 9 Cir., 164 F. 2d 845, 849."

This argument by appellants, we repeat, not having been raised throughout the proceedings and not considered in the opinion of the Court is not properly before this Court in this appeal. The Supreme Court of Missouri did not at any time authorize or approve the payments to these three lawyers out of the fund. Even if the Court had done so, its decision or decisions so ruling would not sustain appellants' claim here that they were denied equal protection of the laws.

This Court has held, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions and more than, in guaranteeing due process, it assures immunity from judicial error. Such rights under the 14th Amendment may not be based on a decision between strangers which is irreconcilable on a matter of law with the decision under review. **Milwaukee E. R. & L. Co. v. Wisconsin, etc.**, 252 U. S. 100, 1056.

CONCLUSION

Appellee Aetna Insurance Company submits the decision of the Missouri Supreme Court did not rule on the validity of any State statute, the decision is correct, is properly based on well-settled principles of law, presents no sub-

stantial Federal question, and the case requires no further argument and consideration. Therefore, appellee prays its motion to dismiss the appeal be dismissed or, in the alternative, the judgment of the Missouri Supreme Court be affirmed.

Respectfully submitted,

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THOMPSON MITCHELL DOUGLAS & NEILL,
St. Louis, Missouri,
Of Counsel.

Proof of Service.

I, James M. Douglas, counsel for Aetna Insurance Company, an appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing on all parties as follows:

1. On the appellants State of Missouri, ex rel. Mildred B. Johnson, Adm'x, et al. by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Walter A. Raymond, Esquire, 915 Grand Avenue, Kansas City, Missouri, on the 11th day of December, 1962.

2. On appellee Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in a

envelope addressed to his attorney of record, Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 11th day of December, 1962.

3. On appellee State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Thomas E. Deacy, Sr., Esquire, 2300 Bryant Building, Kansas City 6, Missouri, on the 11th day of December, 1962.

4. On appellee Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, George A. Spencer, Esquire, 517 Guitar Building, Columbia, Missouri, on the 11th day of December, 1962.

.....

James M. Douglas,
705 Olive Street,
St. Louis 1, Missouri,
Counsel for Appellee Aetna
Insurance Company.

Supreme Court, U.S.
FILED
DEC 20 1962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,
Appellants

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, JACK L. CLAY (SUCCESSOR TO C. LAWRENCE LEGGETT), SUPERINTENDENT OF THE DIVISION OF INSURANCE, DEPARTMENT OF BUSINESS AND ADMINISTRATION OF THE STATE OF MISSOURI

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Appellees.

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Jack L. Clay, successor to C. Lawrence Leggett, Superintendent of the Division of Insurance of the State of

Missouri, one of the appellees in the above-entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the court that the final judgment of the Supreme Court of Missouri be affirmed or, in the alternative, that the appeal herein be dismissed upon the following grounds:

(1) There was not drawn into question the validity of any State statute on the ground of its being repugnant to the Constitution of the United States, so there was no decision in favor of its validity.

(2) No substantial Federal question is involved.

STATEMENT.

This is a direct appeal from the final judgment of the Supreme Court of Missouri in the case of *State ex rel.* v. *Leggett*, 359 S.W.2d 790, which judgment affirmed the action of the Circuit Court of Cole County, Missouri, in dismissing the plaintiffs' petitions in two cases.

The plaintiffs in said cases were attorneys who had been employed in 1930 by the Superintendent of Insurance of Missouri with the consent of the Governor of Missouri to recover certain excess premiums illegally collected by fire and windstorm insurance companies. The contract of employment provided that if the attorneys succeeded in recovering any sums from the insurance companies they should be compensated for their services from the funds so collected.

A large amount of money was collected as a result of the litigation conducted by the attorneys, but the Supreme Court of Missouri ruled that said attorneys could not be paid out of said funds under the law of Missouri and that the portion of their contract of employment so providing

was illegal, *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164. Thereafter followed a long series of litigation by and on behalf of said attorneys to recover compensation for their services, and a history of said litigation is found in the decision herein sought to be reviewed, *State ex.rel.* v. *Leggett*, 359 S.W.2d 790.

The action in the State courts herein sought to be reviewed was an administrative review proceeding instituted to review the action of the Superintendent of the Division of Insurance of Missouri in denying plaintiffs a hearing on their claims for compensation and in denying their compensation, Sec. 536.150, R.S. Mo. 1959 (Sec. 536.105, V.A.M.S.).

ARGUMENT.

I. This Court Does Not Have Jurisdiction of This Appeal.

The validity of no statute of the State of Missouri was drawn in question by the proceedings in the State courts and hence there was no decision by the highest court of the State of Missouri in favor of the validity of a statute. Nowhere in the petitions filed in the trial court was any attack made on any state statute. In the motion for rehearing filed in the Supreme Court after the judgment herein sought to be reviewed was rendered, no attack was made on the validity of any state statute. Jur. Stat. A27. Consequently the Supreme Court of Missouri did not rule in favor of the validity of any State statute.

II. No Substantial Federal Question Is Involved.

A. Appellants Have Not Been Denied Due Process.

Appellants complain that they have been denied access to the courts or quasi-judicial tribunals in which they

cart assert their rights. Jur. Stat. 23. The proceeding in the State courts here sought to be reviewed was a judicial proceeding which appellants initiated and which was carried to a determination of their rights. The record will show that appellants by their actions in the Circuit Court of Missouri invoked the jurisdiction of that court to review the denial by a state officer of their claims for compensation. Therefore appellant did have and did invoke the right to have the adverse ruling of the state officer reviewed under an appropriate statute, Sec. 536.150, R.S. Mo. 1959 (Sec. 536.105, V.A.M.S., 1949 Statutes). Had the Circuit Court overruled the motion to dismiss the review proceeding it would have given the appellants the right to prove the allegations of their petitions. By sustaining the motions to dismiss the Circuit Court held that even admitting all allegations of their petitions to be true, appellants could not obtain relief. Therefore appellants were in a good condition to have their claims ruled on by the courts as if they had put on their evidence to prove their allegations. In fact, they were in better position because they were not confronted by any adverse evidence.

The Supreme Court of Missouri therefore correctly held that the state officer, this appellee's predecessor, did in fact rule upon the claims of appellants. 359 S.W.2d 790, 800. In effect he found all the facts to be as claimed by them as completely as he could have done after an extended hearing. When the Circuit Court dismissed the appellants' petitions it likewise found all the alleged facts in favor of appellants, but it ruled that nonetheless appellants could not recover. The Supreme Court of Missouri by affirming the Circuit Court decision also found the facts alleged by appellants to be true, but that court likewise ruled that appellants could not obtain relief in said actions.

Appellants therefore availed themselves of an administrative tribunal and of a review of that tribunal's rul-

ings by the courts, and hence there has been no denial of appellants' right to access to the courts or quasi-judicial tribunals.

B. There Has Been No Impairment of Appellants' Contract.

Appellants made an invalid contract so far as their compensation was concerned. *Aetna* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164. No authority is cited by appellants to support their claim that even though their contract as to compensation was invalid they are entitled to compensation on some theory of *quantum meruit*. Appellants make the assertion that the Supreme Court had in prior decisions held that they were entitled to receive reasonable compensation. Jur. Stat. 29. We are unable to find any such holding in any of the cases cited by appellants.

C. Appellants Have Not Been Denied Equal Protection of the Law.

Appellants contracted with the State through its Governor and Superintendent of Insurance as to how they should be paid. They must rely upon their contracts just the same as anyone else similarly situated would be required to do. They cite no act of the Legislature nor any decision of any court of Missouri which treated others similarly situated any differently. They make a statement that other lawyers were paid from the same funds which the Supreme Court of Missouri said appellants could not be paid from, and that therefore appellants have been discriminated against. Jur. Stat. 31. The Supreme Court of Missouri held that the fees allowed out of the fund in question to other lawyers referred to were illegally allowed. *Jacobs* v. *Leggett*, 295 S.W.2d 825. If the fact that through some administrative error such illegal fees were paid requires payment of illegal fees to appellants, then we have the ridiculous doctrine that if an officer or agency

of a state does or countenances an illegal act, then forever thereafter all other persons can use such illegal act as a basis for an illegal claim on their part. Such is not the law. *Jacobs v. Leggett*, 295 S.W.2d 825; *Barker v. Leggett*, 102 F. Supp. 642, 645 (D.C. Mo.).

CONCLUSION.

Appellant Superintendent of the Division of Insurance of Missouri respectfully submits that the validity of no State statute was ruled upon by the Supreme Court of Missouri and that there was no substantial Federal question in this case, and that therefore his motion to dismiss the appeal should be sustained or in the alternative that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, John C. Baumann, Counsel for Jack L. Clay, Superintendent of the Division of Insurance of the State of Missouri, and appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing on all parties as follows:

1. On the appellants State of Missouri ex rel. Mildred B. Johnson Admx. et al., by depositing two copies in the U. S. Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Walter A. Raymond, Esq., 915 Grand Avenue, Kansas City, Missouri, on the 18th day of December, 1962.

2. On the appellee Aetna Insurance Company et al., by depositing two copies in the U. S. Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 18th day of December, 1962.

3. On appellee State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Thomas E. Deacy, Sr., Esquire, 2300 Bryant Building, Kansas City 6, Missouri, on the 18th day of December, 1962.

4. On appellee Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, George A. Spencer, Esquire, 517 Guitar

lding, Columbia, Missouri, on the 18th day of Decem-
. 1962.

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IN THE

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Appellants,

vs.

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Appellees.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

APPELLANTS' BRIEF IN OPPOSITION TO SEPARATE MOTIONS TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS OF APPELLEES.

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Appellants,

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Appellees.

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APPELLANTS' BRIEF IN OPPOSITION TO SEPARATE MOTIONS TO AFFIRM OR IN THE ALTERNATIVE TO DISMISS OF APPELLEES.

Appellants respectfully submit the following suggestions in opposition to the Separate Motions to Affirm or Dismiss of all Appellees.

Appellees contend this Court does not have jurisdiction of this appeal. In addition to the authorities cited in our Jurisdictional Statement we desire to call the attention of the Court to the case of *Marcus* v. *Search Warrants of Property, etc.*, 367 U.S. 717, 721, 81 S. Ct. 1708, 1711, holding this Court had jurisdiction of a case where the Supreme Court of Missouri sustained the validity of the State procedures as applied in that case. We have that situation here.

Appellees' motions and arguments are so confusing and misleading we deem it necessary to make a brief summary of the essential facts.

Two distinguished Missouri lawyers, John T. Barker (later an assistant Attorney General of the United States) and Floyd E. Jacobs were legally employed by the Superintendent of Insurance of Missouri to bring an action against Aetna and other insurance companies for restitution of excess premiums illegally collected by them. They were employed by written contract to receive their compensation on a contingent basis out of the funds collected. Working over a period of six years in many Courts they succeeded in obtaining judgment against the insurance companies in the sum of $2,751,000.00. After all policyholders were reimbursed who could be found there remained the sum of $2,160,871.32 which was escheated into the treasury of the State of Missouri (295 S.W.2d, l.c. 838). The Trial Court allowed Barker and Jacobs a fee for their services of $275,000.00, but on appeal the Supreme Court of Missouri held they had a valid contract which they had performed but that this fund was a sacred fund for the policyholders and could not be used to pay fees (*Aetna Ins. Co.* v. *O'Malley*, 124 S.W.2d 1164). They filed and had pending before the Superintendent of Insurance a claim for fees for such

services from 1936 until it was finally peremptorily and without a hearing denied by the Superintendent on February 7, 1958 (359 S.W.2d, l.c. 796). In the meantime Barker and Jacobs sought repeatedly to collect fees for their services from the fund after it was apparent that a large sum would be left over after all policyholders were paid and even after the money had been escheated into the Missouri State Treasury. Always their claims were denied upon the ground this fund was not available to pay them but remained sacred even when escheated into the State Treasury. They applied to the legislature for payment several times, but with no help from the Superintendent, were unsuccessful. Aetna in its brief here on page 10 truthfully states: "In no instance did these cases attempt to decide the merits of the claims." However, on the next page it makes this statement: "Time and again the appellants' claims have been presented, heard and ruled against them" Barker and Jacobs have never had a hearing of their claims on the merits and never will without relief from this Court.

At the time of Appellants' contract in 1930, there was available to them to control and review the acts of the Superintendent the usual common law forums and remedies. But in 1945, the Missouri Legislature passed an Administrative Procedure Act, (Chapter 536, R.S. Mo. 1959) making the procedure there provided the sole remedy for review of all state agencies, including the Division of Insurance.

In the same year by a provision in the 1945 Constitution (Art. IV, Secs. 22 and 25) there was established a governor's budget requiring the Superintendent to include estimates for his division in this budget and providing that no appropriation not recommended in such budget

could be acted upon until all recommendations in the budget were acted upon. This eliminated any reasonable opportunity to obtain a legislative appropriation.

The Missouri Courts held Appellants did have a remedy under the Insurance Code and the Administrative Procedure Act, *State ex rel. Leggett* v. *Jensen*, 318 S.W.2d 353. Aetna admits this in its brief here pp. 4 and 5. In the present opinion the Missouri Supreme Court holds that the Superintendent had the right to deny appellants' claims without a hearing and that his discretion in the matter is not subject to judicial review, thus foreclosing their rights to a hearing on the merits and any judicial forum or judicial remedy.

On page 4 of its brief here Aetna states that Barker and Jacobs received $100,000 through an appropriation by the legislature thereby intentionally representing that such amount was received in part payment for services in this proceeding. For authority for that statement it refers to page 792 of 359 S.W.2d. The local citation is obviously in error as that subject is mentioned only on page 794. It is there shown that this payment was made under an act reported in the Missouri Laws, 1931, p. 69, Sec. 11. Appellants' employment in the present matter was in June, 1930, on a contingent basis and their services were not completed and they made no claim for services until December, 1935, when they were awarded $275,000.00 which was set aside in 124 S.W.2d 1164 on the ground the Court had no authority to allow fees to be paid out of this fund because of its sacred character. The *Aetna* case, 124 S.W.2d 1164, mentions no such payment as involved. The allowance referred to was for another and different employment and is brought in here only for confusion and to prejudice the Court.

I.

The Validity of the Designated Missouri State Statutes Was Drawn in Question in the State Courts As Being in Violation of the Fourteenth Amendment and Article X, Section 1 of the Constitution of the United States.

The subject of the manner of raising the Constitutional questions is covered on pages 15 to 18 of our Jurisdictional Statement.

The Missouri Supreme Court, *en Banc*, held that upon the Superintendent of Insurance refusing to allow Appellants fees under the Missouri Insurance Code, Chapter 374, R.S. Mo., 1959, the only procedure open to Appellants was under the Missouri Administrative Procedure Act, Chapter 536, R.S. Mo., 1959. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 825; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353.

Under such rulings Appellants were forced to proceed under the Missouri Insurance Code and Administrative Procedure Acts. In construing said statutes so as to deny Appellants any recovery the Missouri Courts necessarily ruled in favor of the validity of said statutes as so construed by them.

Any contention that the construction put upon these statutes is contrary to the terms of the statutes is unavailing.

In the case of *State of Minnesota* v. *Probate Court*, 309 U.S. 270, 273, 60 S. Ct. 523, the Court said (l.c. 525):

> "Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has in-

terpreted it. Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885; Guaranty Trust Company v. Blodgett, 287 U.S. 509, 513, 53 S. Ct. 244, 245, 77 L. Ed. 463; Hicklin v. Coney, 290 U.S. 169, 172, 54 S. Ct. 142, 144, 78 L. Ed. 247; Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165, 170, 55 S. Ct. 701, 703, 79 L. Ed. 1365."

In the case of *Poulos* v. *State of New Hampshire*, 345 S. Ct. 395, 403, 73 S. Ct. 760, the Court said (l.c. 765):

"While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S. Ct. 106, 107, 66 L. Ed. 239; Charleston Federal Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627, 89 L. Ed. 857."

In the case of *Hartford Accident & I. Co. v. N. O. Nelson Mfg. Co.*, 291 U.S. 352, 358, 54 S. Ct. 394, the Court said (l.c. 394):

"[1] As to the meaning of the statute now challenged as invalid, the Supreme Court of Mississippi speaks with ultimate authority. Supreme Lodge, Knights of Pythias v. Meyer, 265 U.S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885; Great Northern R. Co. v. Sunburst Co., 287 U.S. 358, 362, 53 S. Ct. 145, 77 L. Ed. 360, 85 A.L.R. 254; Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513, 53 S. Ct. 244, 77 L. Ed. 463."

In the case of *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, the Court said (l.c. 895):

"That construction of the ordinance is a ruling on a question of state law that is as binding on us as though the precise words had been written into the ordinance. See Hebert v. Louisiana, 272 U.S. 312, 317, 47 S. Ct. 103, 104, 71 L. Ed. 270, 48 A.L.R. 1102;

Winters v. New York, 333 U.S. 507, 514, 68 S. Ct. 665, 669, 92 L. Ed. 840."

The Missouri Supreme Court in this case specifically overruled all Constitutional objections. Appendix P. A25, Jurisdictional Statement; 359 S.W.2d, l.c. 800.

Furthermore, it was not necessary that the Missouri Courts directly specify that they are upholding the validity of the Missouri Statutes as against the Constitutional objections when the practical effect and operations of such ruling as applied and enforced by the Missouri State Courts is to uphold their validity as denying appellants all right of recovery. *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 37 S. Ct. 87, 90; *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U.S. 432, 439, 43 S. Ct. 613, 616.

In the case of *Poulos* v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, the Court said (l.c. 875):

> "While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S. Ct. 106, 107, 66 L. Ed. 239; Charleston Federal Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627, 89 L. Ed. 957."

In the cases of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1291, this Court said (l.c. 1296):

> "The State action which is reviewable under the Fourteenth Amendment is the composite result of both legislation and its judicial interpretation."

II.

Appellants Have Been Denied Due Process of Law.

While admitting Barker and Jacobs have never had a decision on the merits on their claim for fees (Aetna's

Motion, p. 10) Appellees assert that because they had access to the Courts long enough in each instance to be handed a ruling denying them a hearing on the merits until finally in this case all remedies were denied them that they have thereby obtained all the benefit of due process guaranteed by the Fourteenth Amendment to the Constitution. Rides on such a procedural merry-go-round which goes nowhere is a far cry from the procedure leading to a decision on the merits as contemplated by the Fourteenth Amendment.

In the case of *Palko* v. *State of Connecticut*, 302 U.S. 319, 327, 58 S. Ct. 149, this Court said (l.c. 153):

> "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. Scott v. McNeal, 154 U.S. 34, 14 S. Ct. 1108, 38 L. Ed. 896; Blackmer v. United States, 284 U.S. 421, 52 S. Ct. 252, 76 L. Ed. 375. The hearing, moreover, must be a real one, not a sham or a pretense. Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406."

In the case of *Carter* v. *People of State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, the Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity."

In the case of *Fay* v. *People of State of New York*, 332 U.S. 261, 67 S. Ct. 1613, the Court said (l.c. 1628):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense. Palko v. State of Connecticut, 302 U.S. 319, 327, 58

S. Ct. 149, 153, 82 L. Ed. 288; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406; Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543."

In the case of *Market St. Ry.* v. *Railroad Commission*, 324 U.S. 548, 562, 65 S. Ct. 770, the Court said (l.c. 777):

> "But due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties."

Due process is far more than a mere procedural exercise as appellees contend. It is designed to put in operation procedures which will bring about a decision on the merits, that is ultimate justice. It is an end to a means and not itself the end as appellees would have it.

The construction put on the Insurance Code and Administrative Procedure Act deprives appellants of any right to redress by any effective procedure.

In the case of *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 54 S. Ct. 140, the Court said (l.c. 142):

> "[2, 3] The appellant says the Act of March 9 arbitrarily deprives him of a remedy for the enforcement of stockholders' liability, which remedy was his property and was taken from him without due process. But although a vested cause of action is property and is protected from arbitrary interference (Pritchard v. Norton, 106 U.S. 124, 132, 1 S. Ct. 102, 27 L. Ed. 104), the appellant has no property, in the constitutional sense, in any particular form of remedy; all that he is guaranteed by the Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure. Iowa Central Ry. Co. v. Iowa, 160 U.S. 389, 393, 16 S. Ct. 344, 40 L. Ed. 467; Backus v. Fort St. Union Depot Co., 169 U.S. 557, 571, 18 S. Ct. 445, 42 L. Ed. 853; Crane v. Hahlo, 258 U.S. 142, 147,

42 S. Ct. 214, 66 L. Ed. 514; Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 158, 52 S. Ct. 69, 76 L. Ed. 214."

Due process contemplates the administration of justice through proceedings which lead to a fair trial and just decision on the merits.

In the case of *Baltimore & Ohio R. R. Co.* v. *United States*, 298 U.S. 349, 369, 56 S. Ct. 797, 807-808, 80 L. Ed. 1209, 1224, this Court said that due process "includes the right to introduce evidence and have judicial findings based upon it."

Barker and Jacobs have been denied that right.

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, 30, this Court said due process also included the "right to resort to the appropriate Courts for redress."

Barker and Jacobs have been denied that right in practical effect. They have never been heard on the merits.

In the case of *Barbier* v. *Connolly*, 113 U.S. 27, 31, this Court said due process under the Fourteenth Amendment undoubtedly intended that all persons "should have like access to the courts of the country for protection of their person, and property, the prevention and redress of wrongs, and the enforcement of contracts".

It requires no argument to demonstrate that the limited procedural access to the Courts permitted Barker and Jacobs herein does not begin to satisfy the requirements of dur process as defined by this Court.

The Superintendent gave no valid reason for not allowing these claims and initiating the proceedings for their payment. His action was an abuse of discretion, arbitrary, capricious, discriminatory and oppressive. Nevertheless the Missouri Supreme Court held it was within his

unbridled discretion to pay his attorneys or not to pay them. 359 S.W.2d, l.c. 799, where it is said the superintendent "cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

The construction of these Missouri procedural statutes by the Missouri Supreme Court to give the Superintendent unbridled and uncontrolled discretion to refuse to compensate appellants for their services fully performed under a valid contract with no access to the Courts is unconstitutional and void.

In the case of *Porporis* v. *City of Warson Woods*, Mo. Sup., 352 S.W.2d 605, the Court said (l.c. 607):

> "It is true, as plaintiffs suggest, that an ordinance or statute which 'attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance' is unconstitutional. Lux v. Milwaukee Mechanics Ins. Co., 322 Mo. 342, 15 S.W.2d 343 cited by plaintiffs."

In the case of *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U.S. 495, 537, 541-542, 55 S. Ct. 837, the Court said (l.c. 846):

> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. . . See Panama Refining Company v. Ryan, supra, and cases there reviewed."

(l.c. 848:)

> "In view of the scope of that broad declaration and of the nature of the few restrictions that are im-

posed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

In the case of *United States* v. *Rock Royal Co-Op, Inc., et al.*, 307 U.S. 533, 576, 59 S. Ct. 993, this Court said (l.c. 1014):

"A right by statute is given handlers to object to the Secretary to any provision of an order as not 'in accordance with law,' with the privilege of appeal to the courts. Section 8c (15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority."

Grant of unbridled administrative discretion as here is unconstitutional and void. *Bowles* v. *Willingham*, 321 U.S. 503, 514-516, 520, 64 S. Ct. 641, 647, 648, 650; *Yakus* v. *United States*, 321 U.S. 414, 442, 64 S. Ct. 660, 676 (33); *American Power & Light Co.* v. *Securities & Exch. Com'n*, 329 U.S. 90, 105, 106, 67 S. Ct. 133, 142.

On Page 9 of its argument in support of its motion filed herein Aetna assumes a pose of injured innocence claiming it discharged its full obligation by contributing its share to payment of the judgment of restitution, and that in return therefor it was released from "further liability of every kind and character arising from the restitution proceeding."

Not only were Aetna and the other guilty companies found civilly liable and required to refund in full all premiums unlawfully collected but in *State* v. *American Insurance Company*, 355 Mo. 1053, 200 S.W.2d 1, Aetna

and 121 other of the guilty companies were subsequently fined for bribery of the Superintendent of Insurance in connection with related subject-matter in the sum of Two Million Ninety Thousand ($2,090,000.00) Dollars. Aetna's share of the fine was Forty-three Thousand ($43,000.00) Dollars. 200 S.W.2d, l.c. 53.* That contradicts Aetna's claim of such full release. Aetna's concept of "fair play" seems to us a little selfish and distorted. They and their co-conspirator insurance companies first defy the order of the Superintendent of Insurance by collecting premiums in excess of the lawful rate involving him in long and expensive litigation to compel restitution. Then they bribe the Superintendent of Insurance to make a compromise settlement which is set aside and a quo warranto proceeding brought against them to oust them or punish them resulting in heavy fines. Now they insist it is better that Barker and Jacobs, who, in the public interest, devoted their time and money for six years to prosecuting the proceedings for the Superintendent and forcing the restitution, should go wholly unreimbursed and unpaid than that they should have to make any contribution to such payment under either provisions of the Missouri Insurance Code in force during all this litigation.

Such alleged release was in any event void and unenforcible.

The Missouri Supreme Court has consistently held that any judgment contrary to the Insurance Code is void. *Aetna Insurance Co. v. O'Malley*, 118 S.W.2d 3, l.c. 8-10. This necessarily includes stipulations between the Super-

*Decided in 1946, approximately 8 years after the case of *Aetna Ins. Co. v. O'Malley*, (1938) 124 S.W.2d 1164, relied upon by appellees which was rendered before discovery of the bribery and fraud.

intendent and the guilty companies embodied in an order of Court in the very case and record relied on.

In the *Aetna* case, *supra*, there was a stipulation permitting the companies to collect and hold the premiums pending litigation over validity of the 10% rate reduction. An order of Court was entered. The statute required excess premiums to be deposited with the Superintendent. On order for restitution the Circuit Court ordered the restitution fund to be deposited with Cook and Lauf as commissioners and custodians. The custodians were also appointed referees to conduct hearings and make refunds. (113 S.W.2d 3, l.c. 7).

In the *Aetna* case, *supra*, on collateral attack the Supreme Court held all orders contrary to the Insurance Code void. (This would include the order relied on if it attempted to release the companies from statutory liabilities.) In so holding the Supreme Court said, in part (118 S.W.2d, l.c. 9):

> "Under the plain terms of the statute, as interpreted by this Court in the case last above cited, the fund in question should have been handled by the companies, wholly independent of the circuit court, and without any court order whatever. That is, it was the statutory duty of the superintendent to hold such excess until litigation ended, then turn same over to the parties entitled thereto under the final judgment of the Court in the review action. • • •
>
> "It will not do to say that because the Court had jurisdiction of the subject matter of restitution and of the parties, any order made or judgment rendered in that action, if wrong, was merely erroneous, but not void for want of jurisdiction. Although a court has jurisdiction of the subject matter of an action it cannot exceed the jurisdiction."

In holding all stipulations and orders in the *Aetna* case, in violation of the Insurance Code, the Court has made it clear that no agreement or judgment of Court contrary to the Insurance Code has any validity. It is void.

We do not believe the Superintendent and the Trial Court in 1936 intended to release the companies from the statutory assessment liabilities for expenses of the Insurance Department or for expenses of proceedings against companies.

If they did do so (which we deny) the opinion of this Court in the same case in 1938 (124 S.W.2d 1164) makes it clear that all orders and stipulations not consistent with the Insurance Code are void.

So it is clear from the opinion in the *Aetna* case (118 S.W.2d 3) that even an agreement of the Superintendent and a judgment entered thereon in conflict with the procedure of the Insurance Code is void, not merely erroneous. In fact the stipulations for settlement which were the basis for the judgment claimed to release Aetna and the other insurance companies was found to have been obtained by bribery and were held to be void. *State v. American Ins. Co.*, Mo. Sup., 200 S.W.2d 1, l.c. 7.

It is also clear that the Superintendent is acting in excess of his powers when he enters into an agreement contrary to the Insurance Code. This has been the defense to enforcement of that part of the contract of Barker and Jacobs for a fee to be paid out of the funds recaptured. *Aetna Ins. Co. v. O'Malley*, 124 S.W.2d 1164, hoildng part of the employment contract void, part good.

The authority, duty and power to determine whether attorney's fees allowed herein be assessed against the guilty companies as incurred in a proceeding against companies or against all companies as an expense of the in-

surance department is a matter which must be determined in the first instance by the superintendent of insurance. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 835 (16); *Barker* v. *Jacobs*, Mo. Sup., 295 S.W.2d 836, 840 (3).

The regulation of the insurance business is held to properly come within the police power of the state. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 108 (6); *State ex rel. Mackey* v. *Hyde*, 315 Mo. 681, 286 S.W. 363, 365 (2); *State ex Inf. McKittrick* v. *Koon*, 356 Mo. 284, 201 S.W.2d 446, 452 (1).

Art. II, Sec. 3, Mo. Const., 1945, provides that the police power of the state shall never be surrendered, abridged or construed to infringe the equal rights of individuals or the general well-being of the state. *May Department Stores Co.* v. *Union Electric L. & P. Co.*, Mo. Sup., 107 S.W.2d 41, 48(3); *City of St. Louis* v. *Cavanaugh*, Mo. Sup., 207 S.W.2d 449, 454, 455.

The construction of the alleged release agreement claimed by Aetna would effect a surrender or abridge the right of the superintendent to assess attorney fees against the guilty parties and is void and of no force and effect. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109; *May Department Stores Co.* v. *Union Electric L. & P. Co.*, Mo. Sup., 107 S.W.2d 41, 48; *State ex rel. Consumers Public Service Co.* v. *Public Service Commission*, 352 Mo. 905, 108 S.W.2d 40 (4); *Railway Exchange Building* v. *Light & Development Co.*, Mo. Sup., 107 S.W.2d 59, 61; *Kalbfell* v. *City of St. Louis*, Mo. Sup., 211 S.W.2d 911, 918 (13).

The superintendent of insurance is an administrative agency with limited contractual authority; he is a creature of the statutes and has no more power than the statutes

give him. *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 832 (9, 10, 11); *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 839 (1).

Like other administrative tribunals the superintendent is a creature of the legislature and does not have any jurisdiction or authority except that which the legislature has conferred upon him; this authority cannot be enlarged by waiver, estoppel, or by contract, or compromise. *Soars* v. *Soars-Lovelace, Inc.*, Mo. Sup., 142 S.W.2d 866, 871 (7-11); *Hogue* v. *Wurdack*, Mo. App., 298 S.W.2d 492, 498, footnote 8 and cases therein cited; *State ex rel. Wabash Ry. Co.*, Mo. Sup., 267 S.W. 102, 108 (8).

The superintendent of insurance could not "even with the approval of the court, delegate his power or duties, or surrender assets which the law compels him to administer." *Hentschel* v. *Fidelity & Deposit Co. of Maryland*, 8 Cir., 87 F.2d 833, 838 (8); *Leggett* v. *General Indemnity Exchange*, Mo. Sup., 250 S.W.2d 710, 716. It necessarily follows he could not surrender his authority to assess the guilty companies as a means of defraying expenses of proceedings against Aetna and the other guilty parties.

As the superintendent of insurance was a public officer the guilty insurance parties entered into such alleged release agreement with notice of his lack of jurisdiction and authority to enter into such an agreement. *Bride* v. *City of Slater*, 263 S.W.2d (l.c. 26). *Elkins-Sawyers Office Equipment Co.* v. *Moniteau County*, Mo. Sup., 209 S.W.2d 127, 131; and cases therein cited. *Grauf* v. *City of Salem*, Mo. App., 283 S.W.2d 15, 17; *County of St. Francois* v. *Brookshire*, Mo. Sup., 302 S.W.2d 1, 4 (7); *Fleshner* v. *Kansas City*, Mo. Sup., 156 S.W.2d 706 (8).

The alleged release agreement is also void as calculated to impede the regular administration of justice

and against public policy. *Boatmen's Nat. Bank of St. Louis* v. *Wurdeman*, 344 Mo. 673, 127 S.W.2d 438, 440 (6).

III.

The Judgments Herein Impair the Obligation of Plaintiffs' Contract.

It is contended by Aetna that no legislative action by the state is involved or claimed to have impaired substantial contractual rights. That has been answered in part in the first point in this brief. In further answer we desire to state as follows:

In the case of *Appleby* v. *City of New York*, 271 U.S. 364, 379, 46 S. Ct. 569, this Court, speaking through Mr. Chief Justice Taft, said (l.c. 573):

> "The questions we have here to determine are First, was there a contract: Second, what was its proper construction and effect: and, Third, was its obligation impaired by subsequent legislation as enforced by the State Court."

See to like effect *Houston & Texas C. R. Co.* v. *Texas*, 177 U.S. 66, 77, 20 S. Ct. 545, 549 (44 L. Ed. 673).

Appellees suggest, without support of authority that because the part of Appellants' contract providing for payment for their services out of the fund collected is unenforceable that means they have no legal claim for payment. The law of Missouri is to the contrary.

In the case of *Nibler* v. *Coltrane*, Mo. Sup., 275, the Court stated the law of Missouri as follows (l.c. 273):

> "Under the allegations of the second count, which alone was submitted to the jury, plaintiff sought to recover the reasonable value of the services of the type and kind mentioned and rendered under the circumstances alleged. From the facts alleged an inference

can be drawn that the services were not gratuitously rendered and that they had not been paid for. It was therefore wholly immaterial that the express contract alleged in the first count or re-incorporated in the second count may have been void and unenforceable for the reasons mentioned by appellant. The rule is stated in 58 Am. Jur. 539, Work and Labor, Sec. 35, as follows: 'When one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his services on a quantum meruit as a benefit to the person receiving them. The law recognizes that services not gratuitous, and neither mala in se nor mala prohibita rendered under an agreement that is invalid or unenforceable, furnish a basis for an implied or constructive contract to pay their reasonable value.' And further, 58 Am. Jur. 541, Work and Labor, Sec. 38, '* * * although there is authority to the contrary, the weight of authority supports the proposition that if the services are not themselves illegal, either intrinsically or by reason of the circumstances under which they are rendered, recovery may be had on a quantum meruit for their reasonable value, although the contract is for other reasons illegal. This is true where one of a number of acts contemplated is not malum in se but merely malum prohibitum. Thus, although the express contract is in no respect enforceable, either as a foundation for a suit or a cross action or as a defense to the original action, or in any other manner, recovery is proper on quantum meruit if the contract is repudiated before the unlawful act is performed.' And see 71 C.J., p. 84, Work and Labor, §§ 45 and 46; Wright v. Broome, 67 Mo. App. 32, 36."

The Missouri Courts have repeatedly held there was a contract (359 S.W.2d, l.c. 793, 799 (1)) and that it meant the Superintendent of Insurance was under duty to pay plaintiffs a reasonable fee for their services. We are here concerned only as to the effect of subsequent legislation.

At the time this contract was entered into in June, 1930 (359 S.W.2d, l.c. 792), the Missouri Department of Insurance headed by the Superintendent of Insurance was a self-sustaining department of the Government required by law to depend exclusively for revenue for its support upon fees and assessments made by the Superintendent against the Insurance Companies doing business in the State. *State ex rel. Leggett v. Jensen*, Mo. Sup., 318 S.W.2d, l.c. 355; Sections 5685, 5686 and 5688, R.S. Mo. 1929 (Now Sections 374.220, 374.230 and 374.260, R.S. Mo., 1959).

Out of the funds so collected it was the duty of the Superintendent to pay all expenses of the Insurance Department, including attorneys' fees. *State ex rel. Lucas v. Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109 (2).

Section 5685, R.S. Mo., 1929, provided the expenses of proceedings against insurance companies should be assessed by the Superintendent against the insurance companies proceeded against. Section 5688, R.S. Mo., 1929, provided any deficiency in revenue to meet expenses should be raised by assessment against the insurance companies. At that time there was no Administrative Procedure Act in Missouri, and the common law remedies were available to collect attorney's fees from the Superintendent.

At the bottom of Page 9 of Aetna's argument it is stated that after 26 years Barker and Jacobs are now attempting to collect against them through assessment by the Superintendent. That statement is misleading. For 26 years (359 S.W.2d, l.c. 792) they have had a claim pending before the Superintendent and have been trying to get the Superintendent to allow them a fee and raise the funds for payment in either of the two ways provided by statute—one of which was assessment against the guilty companies, one of which was Aetna.

The Missouri Constitution adopted in 1945 contained a provision for judicial review of the proceedings of administrative agencies. Art V, Sec. 22, Mo. Const., 1945. Vol. 2, Vernon's Annotated Missouri Statutes, Page 293.

In 1945 the Missouri Legislature passed an Administrative Procedure Act, Laws of Missouri, 1945, p. 1504, Sections 1 to 10 (now Chapter 536, R.S. Mo., 1959). Under the provisions of this Act the common law remedies of Barker and Jacobs were taken away and proceedings under the Administrative Procedure Act made their exclusive remedy to enforce collection from the Superintendent of Insurance. *Jacobs* v. *Leggett*, 295 S.W.2d 825; *Barker* v. *Leggett*, 295 S.W.2d 836; *State ex rel Leggett* v. *Jensen*, 318 S.W.2d 353. The present opinion and judgment of the Supreme Court of Missouri in this case construes the insurance code and the Administrative Procedure Act as affording them no remedy for an admittedly valid contract validly performed.

In the case of *Detroit United Railway* v. *Michigan*, 242 U.S. 238, 37 S. Ct. 87, this Court said (l.c. 89):

> "But in this case there were state laws passed subsequent to the making of the alleged contracts in question, in the form of the legislation of 1905 and 1907 extending the corporate limits of the city. And it is not correct to say that the decisions of the state court turned upon the mere meaning of the contracts without reference to these subsequent laws."

(l.c. 90;)

> "But in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed by the state court of last resort, and this irrespective of the process or reasoning by which the decision is reached, or the

precise extent to which reliance is placed upon the subsequent legislation. (Citing cases) The necessary operation of the decisions under review is to give an effect to the annexation statutes what substantially impairs the alleged contract rights of plaintiff in error as they theretofore stood; and it makes no difference that the result was reached in part by invoking the provisions of another agreement supposed to be binding upon plaintiff in error."

See to like effect *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U.S. 432, 439, 43 S. Ct. 613, 616.

Also in the 1945 Missouri Constitution, Art. IV, Sections 22 and 25, there was created a Governor's Budget System, providing only items recommended in the budget could be acted upon until all budgeted items were acted upon. The superintendent refuses to budget this fee item thereby making relief from the legislature wholly illusory.

By taking away all remedies for enforcement of their contract by the construction of the Missouri Insurance Code and Missouri Administrative Procedural Act the State of Missouri has impaired the obligation of appellants' contract in violation of their rights under Article I, Section 10, of the Federal Constitution.

In the case of *Richmond Mortgage & Loan Corporation* v. *Wachovia Bank & Trust Co.*, 300 U.S. 124, 128, 57 S. Ct. 338, the Court said (l.c. 339):

"The applicable principle is not in dispute. The Legislature may modify, limit, or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

See to like effect *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 429-431, 54 S. Ct. 231, 237.

Under the construction of these statutes by the Missouri Supreme Court appellants are denied any means of enforcement of their contracts.

In the case of *Home Bldg. & L. Ass'n* v. *Blaisdell*, 290 U.S. 389, it is said (l.c. 429):

> "The obligation of a contract is 'the law which binds the parties to perform their agreement.' * * * Nothing can be more material to the obligation than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion."

We can conceive of no greater impairment of the obligation of appellants' contract than the removal of all remedy and means of enforcing it. By the construction of subsequently enacted statutes Missouri has not merely impaired its obligation, but completely destroyed appellants' theretofore valid and enforcible contract.

In the case of *Atlantic Coast Line R. Co.* v. *Phillips*, 332 U.S. 168, 170, 67 S. Ct. 1584, this Court said (l.c. 1585):

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State court's determination whether there was a contract or what was its obligation."

In its opinion herein the Missouri Supreme Court held, 359 S.W.2d (l.c. 799):

> "The superintendent of insurance, however, is merely an official of the executive branch of state government, with powers limited to functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under the

statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

Clearly the Superintendent's refusal to act here is within the functions prescribed by the statutes as within his powers and duties. In fact the opinion herein holds that he alone may perform that function. The above holding gives the Superintendent unbridled discretion to pay or refuse to pay any of the obligations of the Division of Insurance with no recourse for those he chooses not to pay. The refusal of the Superintendent to pay appellants impairs the obligation of appellants' contract and is without reasonable cause, arbitrary, capricious, discriminatory and an abuse of discretion in violation of their Constitutional rights as more fully set out under Point II, *supra*. Please see cases there cited.

Appellants do have a legal right to be paid and the denial of any judicial forum or remedy for the arbitrary action of the Superintendent is a denial of their Constitutional rights.

IV.

Appellants Have Been Denied the Equal Protection of the Law.

The Insurance Code and the Administrative Procedure Act of the State of Missouri have been held to afford remedies for collection of attorney's fees for services rendered the Superintendent of Insurance. *State ex rel. Lucas* v. *Blair*, 346 Mo. 1017, 144 S.W.2d 106, 109; *Jacobs* v. *Leggett*, Mo. Sup., 295 S.W.2d 825, 830; *Barker* v. *Leggett*, Mo. Sup., 295 S.W.2d 836, 839; *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, 355. Those are all

decisions of the Supreme Court of Missouri, *en Banc*, which have never been overruled by that Court. Such statutes are construed by the Missouri Supreme Court to provide an effective remedy for the collection of all claims, including attorney's fees, against the Superintendent for everyone except Barker and Jacobs. No reason is given, or can be given, as to why they are excluded. Such action is purely arbitrary.

This clearly constitutes unjustifiable discrimination and a denial to appellants of the equal protection of the law is in violation of the Fourteenth Amendment to the Constitution of the United States.

In *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461, 57 S. Ct. 838, the Court said (l.c. 839):

> "'it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, Kentucky Railroad Tax Cases, 115 U.S. 321, 337, 6 S. Ct. 57, 29 L. Ed. 414; Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293, 18 S. Ct. 594, 42 L. Ed. 1037, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation.'"

In the case of *Watson* v. *Buck*, 313 U.S. 387, 402, 61 S. Ct. 962, this Court said (l.c. 967):

> "A law which is constitutional as applied in one manner may still contravene the constitution as applied in another."

These statutes as applied to Barker and Jacobs contravene their constitutional rights.

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, this Court in speaking of the Fourteenth Amendment said (l.c. 30):

> "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

In *Duncan* v. *Missouri*, 152 U.S. 377, it is said:

> "And due process of law and equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to the arbitrary exercise of the power of government."

In the case of *Barbier* v. *Connolly*, 113 U.S. 27; l.c. 31; 28 L. Ed. 923, this Court held (l.c. 925):

> "The Fourteenth Amendment • • • undoubtedly intended • • • that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts."

In the case of *Missouri* v. *Lewis*, 101 U.S. 22, 30, this Court said the Fourteenth Amendment prevents any state from denying to any person "the equal right to resort to the appropriate Courts for redress." See to like effect: *Barbier* v. *Connolly*, 113 U.S. 27, 31, 28 L. Ed. 923, 925.

For all the reasons set forth in our Jurisdictional Statement and this Brief we respectfully ask that appellee's Separate Motions to Affirm or Dismiss be overruled and this cause set down for hearing on the merits.

Respectfully submitted.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Appellants.

PROOF OF SERVICE.

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Suggestions to the Separate Motions of Appellees to Affirm or in the Alternative Dismiss the Appeal on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 8th day of January, 1963.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 8th day of January, 1963.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 8th day of January, 1963.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney

of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 8th day of January, 1963.

Walter A. Raymond

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Counsel for Appellants.

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs Deceased, and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,

Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

APPELLANTS' PETITIONS FOR REHEARING FROM THE ORDER OF THE COURT DISMISSING APPELLANTS' APPEAL AND FROM THE ORDER OF THE COURT DISMISSING THEIR PETITION FOR CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,

Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

APPELLANTS' PETITIONS FOR REHEARING FROM THE ORDER OF THE COURT DISMISSING APPELLANTS' APPEAL AND FROM THE ORDER OF THE COURT DISMISSING THEIR PETITION FOR CERTIORARI

BRIEF SUMMARY OF FACTS.

We believe it is impossible for this Court to intelligently understand and fully appreciate the merit in our

petition for rehearing without recalling to mind the essential facts which are the basis of our petition. The members of this busy Court could not possibly remember the basic facts of this case unless your recollection is refreshed. To save your time we respectfully submit this brief summary.

In June, 1930, Barker and Jacobs were legally employed by the Superintendent of the Insurance Department of the State of Missouri to institute proceedings against approximately 150 stock fire insurance companies for restitution of excess premiums collected by the companies in violation of a ten per cent rate reduction order of the Superintendent. Barker and Jacobs were employed under a written contract providing that if they were successful in recapturing all or any part of such funds they would be paid from such funds; if not successful they were to receive no pay. *Actuating Co. v. O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165-1166.

Barker and Jacobs faithfully performed all services required of them from 1930 to 1936, personally paid all expenses of the proceedings and succeeded in recapturing the sum of $2,751,000.00, and after all policyholders entitled to refunds who could be found were paid there remained a fund of $2,160,871.32 which was later paid and escheated in fact into the treasury of the State of Missouri.

The Circuit Court of Cole County, Missouri, allowed Barker and Jacobs a fee of $275,000.00 for their services and made it a lien upon the funds collected but upon appeal by the Superintendent, the Supreme Court of Missouri the Court held said attorneys had been legally employed, had rendered valuable services and were entitled to be paid but that they could not be paid out of the fund collected in accordance with Missouri law generally for the reason

this fund was a sacred trust fund for the sole benefit of policyholders and could not be used for any other purpose. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164.

Under general Missouri law when one performs services under an express contract which for some reason is void or unenforcible he may recover the value of his services on a quantum meruit as a benefit to the person receiving them. *Nibler* v. *Coltrane*, Mo. Sup., 275 S.W.2d 270, 273 (3).

In the case of *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court said (l.c. 355):

> "The Insurance Code provides two methods of payment of expenses which are invoked by plaintiffs. Section 374.220 provides: 'The expenses of proceedings against insurance companies * * * shall be assessed by the superintendent upon the company proceeded against * * * and shall be in the first instance paid by such company, on the order of the superintendent directly to the person or persons rendering the service.' Sec. 374.260 provides that, if the expenses of the Division exceed the fees required to be collected, 'the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess;' and that 'such assessments shall be made in proportion to the relative amounts of the assets of each company.' The intent of these provisions, of course, is that all expense of the operation of the Division of Insurance shall be paid by the companies so that it would cost the state nothing. See Sec. 374.160. Undoubtedly, it is intended that the Superintendent shall have discretion as to the use of these authorized methods, which plaintiffs apparently recognized by asking him to do one or the other. Of course, as suggested in Aetna Ins. Co. v. O'Malley, 343 Mo. 1232, 124 S.W.2d 1164, 1168, the Legislature could make an appropriation out of general

revenue to pay plaintiffs, without action by the Superintendent."

In 1936 said attorneys filed a claim in writing with the Superintendent of Insurance requesting that he audit, fix, allow and pay their claims. Said claims remained pending before the Superintendent and were renewed and amended from time to time with no action thereof by the Superintendent until February 7, 1958, when the Superintendent without notice or hearing overruled and dismissed said claims.

After it became apparent there would be a large residue left in the fund after all policyholders who could be found were paid and again even after the rights of all further policyholders in said fund had expired by reason of limitations said lawyers attempted unsuccessfully to enforce payment of their fees from said fund but the state escheated said fund into the State Treasury free from the claims of said lawyers. *Weatherby, Jacobs and Barker v. Jackson*, 358 Mo. 542, 215 S.W.2d 742; *Jacobs v. Leggett*, Mo. Sup., 295 S.W.2d 825.

The Missouri Supreme Court denied said lawyers had a right of recovery in quantum meruit in an action brought directly against the Superintendent. *Barker v. Leggett*, Mo. Sup., 295 S.W.2d 836. The Missouri Supreme Court there said (295 S.W.2d l.c. 840):

> "We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to approve the usual expenses and to assess the expenses of proceedings against companies. We believe the right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R.S. Mo. 1949, and more

particularly Sec. 536.100 dealing with judicial review of administrative decisions."

In the case of *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court again reiterated the above statement except that it shifted its position and designated Section 536.105 as the appropriate Administrative Procedure Review instead of Section 536.100 as formerly designated.

The Attorney General of Missouri as the Superintendent's legal adviser then advised the Superintendent to give these lawyers hearing on the merits. Thereafter the Superintendent contrary to said advice of the Attorney General, arbitrarily, without notice or any opportunity for said lawyers to present evidence or even be heard peremptorily denied and dismissed their claims.

Upon said lawyers attempting to pursue the Administrative review procedure from said ruling of the Superintendent as pointed out by the Supreme Court of Missouri, the Circuit Court dismissed such proceedings upon motion directed against the pleadings and without a hearing on the merits. Upon appeal from such rulings of the Circuit Court the Supreme Court of Missouri expressly overruled our Constitutional objections (359 S.W.2d, l.c. 800) and rendered the opinion and judgment herein complained of affirming the action of the Superintendent and Circuit Court denying said claimants any recovery on the ground that the Superintendent "cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance." 359 S.W.2d, l.c. 799. In other words the Supreme Court of Missouri construed the aforesaid statutes as holding that claimants' only remedy was through the Superintendent but that the Superintendent had an unbridled and uncontrolled discretion to refuse to hear their claims on the merits which was above and beyond any power of review and control by the Courts.

APPELLANTS' PETITION FOR REHEARING FROM THE ORDER DISMISSING THEIR APPEAL.

Come now appellants and petition the Court to set aside its order and judgment dismissing their appeal and upon reconsideration to note jurisdiction and set the cause down for oral argument, and for grounds of said petition appellants state:

1. The Court overlooked and inadvertently failed to consider the fact that the basis of the ruling of the Supreme Court of Missouri herein complained of was the fact that there was drawn in question the validity of statutes of Missouri on the grounds they were repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of their validity.

The Missouri Supreme Court held appellants' only primary and also final recourse was under the statute, Section 374.160, R.S. Mo., 1959, dependent upon the Superintendent of Insurance auditing, allowing and including appellants' claim in the executive budget followed by a legislative appropriation in accordance therewith (359 S.W.2d, l.c. 796, 798).

The Missouri Supreme Court held appellants' exclusive and only right of review of the order and ruling of the Superintendent of Insurance on appellants' claim was under Section 536.105, R.S. Mo., 1959, of the Missouri Administrative Procedure Act.

Appellants contended in the Missouri Supreme Court that the construction of those statutes denying them a hearing on the merits before a judicial forum and denying them

any right of recovery of compensation for services fully performed to the enrichment of the Missouri State Treasury in the sum of $2,160,871.32 under an admittedly valid contract rendered said statutes, as so construed, in violation of the Constitution of the United States (359 S.W.2d 797, 798, 799, 800). The Supreme Court of Missouri directly overruled those Constitutional objections saying, 359 S.W.2d, l.c. 800:

> "[3] When the superintendent assumed as true the facts upon which the claims were asserted and denied them, he, in effect, reviewed and ruled them on their merits, as required by § 536.105. Such review clearly constituted due process. State ex rel. Leggett v. Jensen, Mo., 318 S.W.2d 353, 357 [3, 4]. Moreover, such review was not violative of Article I, § § 13 and 14, of the Constitution of Missouri. Aetna Ins. Co. v. O'Malley, and Jacobs v. Leggett, both supra.
>
> "The decision herein reached makes it unnecessary to discuss the further contentions and questions raised.
>
> "The judgment of the trial court dismissing the applications for fees is affirmed."

(359 S.W.2d, l.c. 799:)

> "The refusal of the superintendent to recognize and allow said fees does not constitute deprivation of plaintiffs' liberty and property within the due process clauses of the Constitution of the United States and of the Constitution of the State of Missouri or the right of the freedom of contract in violation of the Fourteenth Amendment of the Constitution of the United States."

2. This Court overlooked and failed to consider the fact that this contract was entered into in June, 1930 (359 S.W.2d, l.c. 792): that at that time appellants had available to them the usual extraordinary remedies of the common law to compel action by the Superintendent of Insurance

and the usual liberal remedies of review by appeal from the action of the Superintendent.

In 1945, the Missouri legislature first passed the Administrative Procedure Act, of which Sec. 536.105, R.S. Mo., 1959, is a part, providing it should furnish the exclusive and only right of review of the acts of the Superintendent, and in the same year the 1945 Missouri Constitution was adopted establishing an executive budget providing that no appropriation not recommended in such budget should be acted upon until all recommendations in the budget were disposed of (Art. IV, Secs. 22 and 25, Mo. Const., 1945). This eliminated any reasonable opportunity to obtain a legislative appropriation without favorable action by the Superintendent.

The Missouri Supreme Court herein held that under the limited review permitted by Section 536.105, R.S. Mo. 1959, the Superintendent has absolute discretion, free from judicial control or review for abuse, to deny appellants' claims for compensation for services fully performed under a valid contract (359 S.W.2d, l.c. 799).

The subsequently enacted legislation as construed by the Missouri Supreme Court, which construction becomes a part thereof as if written in by the legislature (*Terminello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 895; *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 570, 69 S. Ct. 1291, 1296) entirely destroys appellants' contract not only interfering with appellants' Constitutional guaranty of the right to contract about their affairs but also impairing its obligation to the extent of completely destroying it.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S. Ct. 1464, 1469, 89 L. Ed. 2079, this Court declared a right without a remedy is not right at all.

3. This Court overlooked and failed to give proper consideration to the fact the ruling of the Missouri Supreme Court holds that the Superintendent has arbitrary discretion to refuse to pay legitimate obligations of the Department of Insurance, which can be paid in no other way, and the Courts are powerless to review for abuse of discretion or afford any kind of protection to any creditor of that department whom the Superintendent in his arbitrary discretion may elect not to pay. The ruling of the Court is as follows (359 S.W.2d, l.c. 799):

> "The superintendent of insurance, however, is merely an official of the executive branch of the state government, with powers limited to the functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

The opinion of the Supreme Court of Missouri holding the Superintendent of Insurance has an unfettered and uncontrolled discretion to pay or not pay the valid obligations of the Missouri Insurance Department is in direct and irreconcible conflict with the opinion of this Court in the case of *Angel* v. *Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, where this Court said (l.c. 660):

> "The Contract Clause, U.S. Const. Art. 1, § 10, the Full Faith and Credit Clause, U.S. Const. Art. 4, § 1, the Privileges or Immunities Clause, U.S. Const. Art. 4, § 2, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts. Broderick v.

Rosner, 294 U.S. 629, 642, 55 S. Ct. 589, 592, 79 L. Ed. 1100, 100 A.L.R. 1133. A State 'cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent.' Kenney v. Supreme Lodge, 252 U.S. 411, 415, 40 S. Ct. 371, 372, 64 L. Ed. 638, 10 A.L.R. 716; and see White v. Hart, 13 Wall. 646, 20 L. Ed. 685. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 12, 14, 68 L. Ed. 143."

Here the State is attempting to escape the Constitutional obligations of one of its agencies by denying its Courts have jurisdiction to enforce the valid contracts of the Superintendent of Insurance. That is directly contrary to the decision of this Court in the above case and in violation of Appellants' Constitutional rights.

Such ruling clearly denies appellants access to any judicial tribunal and a judicial remedy for their valid contract fully performed and violates their rights to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

Congress may not even delegate unfettered discretion to the President of the United States without violating the United States Constitution: *A. L. A. Schecter Poultry Corporation v. United States*, 295 U.S. 495, 537, 541-542, 55 S. Ct. 837, 846, 848.

4. The Court inadvertently overlooked and failed to consider the fact that although the statutes involved are fair on their faces the construction put on them by the

Missouri Supreme Court makes then unconstitutional and calls for relief at the hands of this Court. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

In the case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 679-683, 50 S. Ct. 451, the Court said (l.c. 454):

> "[4-10] Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U.S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U.S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legaslative, executive, or administrative branch of government."

5. The Court overlooked and failed to understand and appreciate the hollow sham and pretense of the procedure held by the Supreme Court of Missouri to satisfy the requirements of due process and equal protection of the law under the guarantees of the United States Constitution. It is conceded appellants had a valid contract fully performed to the enrichment of the State of Missouri and were entitled to be paid but that the Superintendent of Insurance had an absolute discretion to pay or not to pay their claim and the Missouri Courts were powerless to review or control his action. The concept of due process enunciated by the Missouri Supreme Court is that merry-go-round trips through the Courts with no decision on the merits and always returning to the original point of departure finally ending in a decision that the Superin-

tendent has absolute discretion to pay or not to pay obligations of his department satisfies all requirements of due process under the Constitution of the United States.

The opinion of the Missouri Supreme Court herein is in direct conflict with the following decisions of this Court.

In the case of *Carter v. People of the State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, the Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity."

In the case of *Fay v. People of State of New York*, 332 U.S. 261, 288, 67 S. Ct. 1613, this Court said (l.c. 1628):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial in which the hearing is a real one, not a sham or pretense. Palko v. State of Connecticut, 302 U.S. 319, 327, 58 S. Ct. 149, 153, 82 L. Ed. 288; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406; Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543."

In the case of *Baltimore & Ohio R. R. Co. v. United States*, 298 U.S. 349, 369, 56 S. Ct. 797, 807-808, 80 L. Ed. 1209, 1224, this Court said that Due Process "includes the right to introduce evidence and have judicial findings based upon it." Appellants have been denied that right.

In the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681, 50 S. Ct. 455, the Court said (l.c. 454):

> "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of

all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215."

An adjudication of an issue implies that a party had a chance to win his case. The shameful record of this case shows clearly that appellants never had a chance to win their case. When they attempted to follow the exact procedures pointed out by the Supreme Court of Missouri as affording them a remedy that Court twice shifted positions finally concluding appellants are at the mercy of the uncontrollable discretion of the Superintendent and have no remedy or right to a judicial forum for the enforcement of their valid contract fully performed. *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353; *State ex rel. Johnson, Admx.*, v. *Leggett*, Mo. Sup., 359 S.W.2d 790.

Surely this Court, busy as it is, cannot stand by and condone the one-sided, unfair and shifting procedures of the Missouri Courts in this case to stand on the public records as affording loyal and distinguished American citizens the due process of law contemplated by the Fourteenth Amendment.

WHEREFORE, appellants pray the Court to vacate and set aside its order and judgment dismissing appellants' appeal, note jurisdiction and set the cause down for argument on the docket at the early convenience of the Court.

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Kansas City 6, Missouri,
Counsel for Appellants.

CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing of the judgment and order of this Court dismissing appellants' appeal is presented in good faith and not for delay.

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Appellants.

PETITION FOR REHEARING FROM THE ORDER DENYING CERTIORARI.

Come now Appellants and move the Court to vacate and set aside its order denying certiorari herein, note jurisdiction and set this case down for argument because of the following other substantial grounds not previously presented:

I. The Opinon and Judgment of the Missouri Supreme Court Denying Petitioners Any Right of Enforcement of Compensation Due Them under a Valid Contract for Services Admittedly Rendered from Which the State of Missouri Profited in the Sum of $2,160,871.32 Constitutes a Taking of Their Property Without Compensation in Violation of Their Rights under the Fourteenth Amendment to the Constitution of the United States.

Petitioners' contract rights to compensation for their services is a property right.

In the case of *Lynch* v. *United States*, 292 U.S. 571, 54 S. Ct. 840, it is said:

> "Valid contracts are property, whether the obligor is a private individual, a municipality, a state, or the United States."

In the case of *North Texas Producers Association* v. *Young*, 5 Cir., 308 F 2d 234, the Court said (l.c. 243):

> "A valid contract is property. Miller et als. v. Howe Sound Min. Co., (D.C.E.D. Wash.) 77 F. Supp. 540; Deutsche Bank, etc., v. Cummings, (C.C.A.D.C. 1936) 83 F.2d 554; Lynch v. United States, (1934) 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. The last cited

cases, from courts of all levels conclusively hold that valid contracts are 'property'."

In the case of *Adrance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288, 53 S. Ct. 133, the Court said (l.c. 134):

> "[1] The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the state in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule, and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U.S. 525, 545, 546, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238, and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. Cf. Steele v. Drummond, 275 U.S. 199, 205, 48 S. Ct. 53, 72 L. Ed. 238; Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356, 51 S. Ct. 476, 75 L. Ed. 1112."

There is here and can be no dominant public interest against the Department of Insurance compensating its attorneys for fruitful services rendered under valid contracts. All rules of equity and morals are against such a position, and our opponents have never been bold enough to take that position.

Denying petitioners any remedy for enforcement of their compensation, admittedly fully earned under a valid

contract constitutes a "taking" of petitioners' property within the meaning of the Fourteenth Amendment.

In the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, the Court said (l.c. 160):

> "As was said in a Pennsylvania case, 'for practical purposes, the right to coal consists in the right to mine it'. Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 Atl. 820, L.R.A. 1917E, 672. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for Constitutional purposes as appropriating or destroying it. This we think we are warranted in assuming the statute does.
>
> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

What makes a contract to render legal services for the Department of Insurance valuable is the right to be paid for such services. Regulation to the extent of eliminating pay for such services, as here, clearly constitutes an appropriation of their earnings or a destruction of their property rights in said contract.

In the case of *United States v. General Motors Corp.*, 325 U.S. 373, 378, 65 S. Ct. 357, this Court said (l.c. 359):

> "[3] In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner, rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its

effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

To similar effect see *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 62, 55 S. Ct. 555, where it is said (l.c. 557):

"The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

When you take out the pay for services you take out all that is attractive or valuable.

In the case of *United States* v. *John J. Felin & Co.*, 334 U.S. 624, 630, 68 S. Ct. 1238, the Court said (l.c. 1241):

"In enforcing this constitutional requirement 'the question is, What has the owner lost? not, What has the taker gained?' Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 460, 54 L. Ed. 725; McGovern v. New York, 229 U.S. 363, 33 S. Ct. 876, 57 L. Ed. 1228, 46 L.R.A., N.S., 391. Respondent's sole claim is for the pecuniary equivalent of the property taken."

In the case of *Chicago, B. & Q. R. Co.* v. *City of Chicago*, 166 U.S. 226, 17 S.W. 581, 583, 584, the Court said:

"Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Bloom, in his work on Constitutional Law, says, 'is that of enjoying private property without undue interference or molestation.' Page 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law

for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' 2 Story, Const. § 1790; 1 Bl. Comm. 138, 139; Cooley, Const. Lim. *559; People v. Platt, 17 Johns. 195, 215; Bradshaw v. Rogers, 20 Johns. 103, 106; Petition of Mt. Washington Road Co., 4 N.H. 134, 142; Parham v. Justices of Inferior Court, 9 Ga. 341, 348; Ex parte Martin, 8 Eng. (Ark.) 199, 206, et seq.; Johnston v. Rankin, 70 N.C. 550, 555.

"But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

"It is not contended—as it could not be—that the constitution of Illinois deprives the railroad company of any right secured by the fourteenth amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities,—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'that state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U.S. 339, 346, 347; Neal v. Delaware, 103 U.S. 370; Yick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064; Gibson v. Mississippi, 162 U.S. 579, 16 Sup. Ct. 904. These principles were enforced in the recent case of Scott v. McNeal, 154 U.S. 34, 14 Sup. Ct. 1108, in which it was held that the prohibitions of the fourteenth amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and consequently it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the fourteenth amendment.

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared

in court, and was permitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice,—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard,—met the requirement of due process of law. U.S. v. Cruikshank, 92 U.S. 542, 554; Leeper v. Texas, 139 U.S. 462, 468, 11 Sup. Ct. 577. But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment."

II. The Opinion and Judgment of the Supreme Court of Missouri Herein Deprive Petitioners of Their Liberty of Contracting About Their Affairs and Being Able to Enforce Their Contracts in the Courts in Violation of Rights Guaranteed Them under the Fourteenth Amendment to the Constitution of the United States.

In the case of *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356, 51 S. Ct. 476, the Court said (l.c. 477):

> "[1-3] The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. Printing Company v. Sampson, L. R. 19 Eq. 462, 465; Baltimore & Ohio Southwestern Ry. v. Voigt, 176 U.S. 498, 505, 20 S. Ct. 385, 44 L. Ed. 560."

In the case of *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S. Ct. 630, the Court, in holding the Kansas Industrial Court Act unconstitutional, said (l.c. 632):

> It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. , decided June 4, 1922. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

In the case of *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, it is stated:

"Without doubt, [liberty] denotes not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations in life. * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

In the case of *Prudential Ins. Co. of America* v. *Cheek*, 259 U.S. 530, 42 S. Ct. 516, the Court stated the law as follows (l.c. 519):

"That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed that principle in recent cases."

In the case of *Nebbia* v. *People of State of New York*, 291 U.S. 502, 523, 54 S. Ct. 505, the Court said (l.c. 510):

"[2] Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."

Certainly the enforcement of petitioners' contract for compensation for services rendered under a valid contract resulting in the State being enriched by the fruits of their labor in the sum of $2,160,871.32 will not react to the detriment of their fellows or work them harm.

The ruling of the Supreme Court of Missouri that petitioners are free to contract and their contracts are valid except that they cannot in the Court of Missouri enforce payment of their compensation fully earned under such valid contract strikes down or arbitrarily interferes with their freedom of contract in violation of rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States.

In the case of *De La Rama S. S. Co.* v. *United States*, 344 U.S. 386, 390, 73 S. Ct. 381, the Court in describing a similar situation said (l.c. 383):

> "For the Government to acknowledge the liability but to deny the full extent of its enforceability recalls what was said in The Western Maid, 257 U.S. 419, 433, 42 S. Ct. 159, 161, 66 L. Ed. 299: 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.'"

Petitioners have been arbitrarily, unreasonably and discriminatorily denied their right of freedom of contract for employment for compensation; their federally guaranteed rights have been invaded and the only place they can look is to this Court. We sincerely and earnestly hope and trust they will not look in vain. They rely upon the promise of this Court in the case of *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773 where this Court said (l.c. 777):

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

The opinion of the Supreme Court of Missouri holding the Superintendent of Insurance has an unfettered and uncontrolled discretion to pay or not pay the valid obligations of the Missouri Insurance Department is in direct and irreconcilable conflict with the opinion of this Court in the case of *Angel* v. *Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, where this Court said (l.c. 660):

> "The Contract Clause, U.S. Const. Art. 1, § 10, the Full Faith and Credit Clause, U.S. Const. Art. 4, § 1, the Privileges or Immunities Clause, U.S. Const. Art. 4, § 2, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts. Broderick v. Rosner, 294 U.S. 629, 642, 55 S. Ct. 589, 592, 79 L. Ed. 1100, 100 A.L.R. 1133. A State 'cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent.' Kenney v. Supreme Lodge, 252 U.S. 411, 415, 40 S. Ct. 371, 372, 64 L. Ed. 638, 10 A.L.R. 716; and see White v. Hart, 13 Wall. 646, 20 L. Ed. 685. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143."

Here the State is attempting to escape the Constitutional obligations of one of its agencies by denying its Courts have jurisdiction to enforce the contracts of the Superintendent of Insurance. That is directly contrary to the decision of this Court in the above case and in violation of Appellants' Constitutional rights.

In the case of *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, this Court said (l.c. 776):

> "[5] But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that 'the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated.' [150 F.2d 98.]"

We submit that language is appropriate to the complaint here and calls loudly for relief at the hands of this Court.

WHEREFORE, appellants pray the Court to vacate and set aside its order and judgment denying appellants' petition for certiorari, note jurisdiction and set the cause down for argument on the docket at the early convenience of the Court.

Walter A. Raymond,

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri,
Counsel for Appellants.

CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing of the judgment and order of this Court denying Certiorari is presented in good faith and not for delay, and said Peti-

tion is restricted to other substantial grounds not previously presented.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri.

PROOF OF SERVICE.

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Petitions for Rehearing from the Order Dismissing Appellants' Appeal and from the Order Denying Certiorari on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 13th day of February, 1963.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 13th day of February, 1963.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney

of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 13th day of February, 1963.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 13th day of February, 1963.

Walter A. Raymond

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